IN THE

Supreme Court of the United States

OCTOBER TERM, 1962.

No. 832

BEATRICE FOODS CO.,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT (AND APPENDICES).

GEORGE B. CHRISTENSEN,
Counsel for Petitioner.

WINSTON, STRAWN, SMITH & PATTERSON,
38 South Dearborn Street,
Chicago 3, Illinois,

FITZGERALD, HAMER, BROWN & LEAHY,
Insurance Building,
Omaha 2, Nebraska,
Of Counsel.

THE GUNTHORP-WARREN PRINTING COMPANY, CHICAGO

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Beatrice Foods Co. prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit entered herein. (Judgment appears as Appendix C.)

OPINIONS BELOW.

The opinion of the Court of Appeals has not yet been reported and is printed as Appendix A hereto. (Petitioner raises no point here as to Section 1 of the opinion, "Challenge to the grand jury array" pp. 29 to 37 *infra*, and it will be unnecessary for this Court to study those pages.)

JURISDICTION.

Judgment of the Court of Appeals was entered January 2, 1963. Jurisdiction of this Court is invoked under 28 U. S. C., Sec. 1254(1). Time for this petition was extended by Mr. Justice Brennan to February 27, 1963.

QUESTIONS PRESENTED.

1.

May a criminal conviction under the Sherman Act be permitted where the Government's direct evidence expressly negatives the conspiracy charged and its circumstantial evidence is as consistent with innocence as with guilt?

2.

Where the prosecutor repeatedly argues to the jury that he has proved a "blatant" crime other than the one charged in the indictment (and also has proved the one charged), is it a violation of due process and of the right to an indictment specifying the nature and cause of the accusation for the court to instruct the jury that it must find the defendant guilty if it believes the other, non-alleged crime was proved?

3.

In what at best for the Government is a close or doubtful criminal case has a defendant's right to a fair jury trial been properly weighed when a court fails to consider the cumulative prejudice of multiple evidentiary and instructional errors?

4.

Where a timely, sworn motion is made for dismissal of an indictment (and for production of the grand jury minutes to support the averments of the motion), because the

prosecutor invaded the province of the grand jury and procured the indictment by accusing witnesses of perjury, by repeatedly stating that the crime, the possible existence of which was for the jury to determine, had in fact been committed, and by making other evaluative statements, is it a denial of due process and a defendant's right of confrontation for the District Court to refuse access to the jury minutes, to examine them *in camera* and then hold that the motion to dismiss should be denied because, in the District Court's opinion, the minutes did not support the motion?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED.

Constitution of the United States, Amendments V and VI.
15 U. S. C. 1, 26 Stat. 209 (Sherman Act).
15 U. S. C. 16(a), 38 Stat. 731 (Clayton Act).
(Texts are set forth in Appendix D.)

STATEMENT.

Petitioner was indicted for allegedly conspiring with Roberts Dairy Company and Alamito Dairy Company to eliminate and suppress competition in the sale of milk and cream to Offutt Air Force Base and to United States Veterans Hospital, both near Omaha, from January 1954 to April 1957.

The indictment, as the Court of Appeals recognizes (p. 48, *infra*), was "very confined"; it did *not* charge defendants with illegally maintaining uniform prices, although the fact, necessarily well known to the grand jury, was that there were uniform prices to the public and to dealers in the Omaha area before, during, and after the indictment period. The indictment alleged no illegality in this. On so-called bid business with large consumers such

as hospitals and the Air Base, members of the industry, including defendants, offered *non-uniform discounts, i.e., non-uniform net prices, from the prevailing wholesale price.*

The indictment specified the asserted crime was (1) "to fix and establish [not *uniform*, but] *non-competitive* prices and discounts for milk and cream sold to Offutt Air Force Base" and to Veterans Hospital, and (2) to allocate to Roberts Dairy the business of Veterans Hospital and to allocate to Alamito and Beatrice alternately the business at the Air Force Base (Ct. File pp. 1-8).[1]

The asserted conspiracy thus was alleged not to be in the general market area in which several operators could, or might, participate for all or part of time alleged. It was alleged to be a tri-partite affair essentially to split the Government business three ways. If it existed at all it necessarily had to be tri-partite because agreement by Alamito and Beatrice on prices at Air Base would be valueless unless Roberts agreed not to upset it; agreement by Beatrice alone with Roberts to "allocate" to the latter the Hospital business would be ineffective without the concurrence of Alamito in the supposed "allocation." The case had to stand on a tripod or it could not stand at all.

Roberts and Alamito, to avoid the hazard of litigation, pleaded *nolo*. Beatrice pleaded not guilty.

On the trial, officials of Roberts and Alamito were called as Government witnesses but did not support the Government's theories; they denied the existence of the asserted conspiracy. At the close of the Government's evidence Beatrice stood on its motion for acquittal. The jury returned a verdict of guilty. Post trial motions were overruled and petitioner was fined $15,000.

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1. Under practice of the 8th Circuit the record was not printed for use of the Court of Appeals and has not been printed for this application. Such particular material as it is believed the Court may wish to examine in connection with this petition is printed as Appendices hereto.

THE EVIDENCE.

The Government produced no evidence of any meeting or agreement between defendants with respect to the Air Base or Veterans Hospital business which was awarded on sealed bids.

On the contrary, the Government produced the wholesale manager of Alamito, who testified that he determined what Alamito's bids would be, that he never knew what his competitors were going to do, and that he attended bid openings to find out what they had done (R. 99-103). A member of the Executive and Pricing Committees of Roberts testified it made its general prices without consultation with anyone (R. 177). With respect to the failure of Roberts to bid for Air Base business during and *after* the indictment period, the Government's own evidence showed that immediately preceding the alleged conspiracy period a dispute developed between Roberts and the Air Base over the latter's practices of taking what Roberts believed to be unearned "cash discounts" (R. 198-199); that thereupon Roberts ceased bidding for the Air Force business although it continued to seek business with the Veterans' Administration.

The Government's case was based on (a) the contention that the alleged "pattern" of bidding was a circumstance tending to indicate collusion; (b) an alleged declaration (hearsay and outside the presence of petitioner), by a deceased route manager of Alamito, not shown to be a policy maker of that company, made to one Vavra that it was the "policy" of "the companies" to rotate the Air Base business; (c) two conversations, over two years after the supposed conspiracy supposedly had been in operation, between a Roberts manager and a Beatrice manager that "had to do with matters affecting the area generally and * * * not directed specifically to business at the Base and the Hospital" (Op. p. 50, *infra*).

The history of the bidding is in the two following tabulations:

Offutt Air Force Base

TRADE DISCOUNTS BID***

Successful Bidder Underscored.

Period	Alamito	Beatrice	Roberts	
2- 1-51 to 8-31-51	0%	0%	0%	
11- 1-51 to 2-29-52	0%	3½%	0%	
3- 1-52 to 8-31-52	0%	0%	0%	
4-21-52 to 8-31-52	0%	2%	1%	
9- 1-52 to 2-28-53	0%	No Bid	0%	
3- 1-53 to 8-31-53	0%	2%	0%	
9- 1-53 to 11-30-53	0%	2%	2%-2% cash (3.96%*)	
12- 1-53 to 2-28-54	0%	5%	2%	
3- 1-54 to 5-31-54	2%	0%	0%	Asserted Conspiracy Period
6- 1-54 to 8-31-54	2%	0%	0%	
9- 1-54 to 11-30-54	0%	2%	0%	
12- 1-54 to 2-28-55	0%	2%	0%	
3- 1-55 to 5-31-55	2%	1%	0%	
6- 1-55 to 11-30-55	2%	1%	0%	
12- 1-55 to 5-31-56	1%	2%	0%	
6- 1-56 to 11-30-56	2%	1½%	0%	
12- 1-56 to 5-31-57	1%	2%	0%	
6- 1-57 to 11-30-57	2%	1%	0%**	
12- 1-57 to 5-31-58	1¼%	0%	0%	
6- 1-58 to 11-30-58	0%	0%	0%	

* Incorrectly Appears on All Government Charts as 4%.

**On 1 Item Roberts Bid 6% and Was Awarded Partial Contract.

*** Cash Discounts 30 Days or Over Considered Trade Discounts.

VETERANS HOSPITAL

TRADE DISCOUNTS BID*****

Successful Bidder Underscored.

Period	Alamito	Beatrice	Roberts	
4- 1-51 to 6-31-51	0%	4½%	0%	
7- 1-51 to 9-31-51	0%	0%	0%	
10- 1-51 to 6-30-52	0%-10½ cash	7½%	0%	
7- 1-52 to 9-31-52	0%	0%	1%	
10- 1-52 to 12-31-52	No Bid	1%	0%	
1- 1-53 to 3-31-53	0%	0%	0%	
4- 1-53 to 6-30-53	0%	1%	2%	
7- 1-53 to 9-31-53	3%	0%*	0%	
10- 1-53 to 12-31-53	0%	5%	0%	
1- 1-54 to 3-31-54	0%	5%	2%	
4- 1-54 to 6-30-54	0%	0%	2%	
7- 1-54 to 12-30-54	No Bid**	No Bid**	1½%***	Asserted Conspiracy Period
1- 1-55 to 6-30-55	No Bid**	1%	2%	
7- 1-55 to 12-31-55	No Bid	No Bid	2%	
1- 1-56 to 3-31-56	0%	0%	2%	
4- 1-56 to 6-30-56	0%	0%	2%	
7- 1-56 to 12-31-56	No Bid**	0%	2%	
1- 1-57 to 6-30-57	No Bid	0%	2%***	
7- 1-57 to 6-30-58	2½%****	No Bid	No Bid	
7- 1-58 to 9-30-58	No Bid	5%	No Bid	

* Bid 2% Alternate Period.

** Bid 0% Alternate Period.

*** 1½% For 6 Mo. Rather Than 2% for 12 Mo. Accepted.

**** One Item at No Discount.

***** Cash Discounts 30 Days or Over Considered Trade Discounts.

In addition, the Government was permitted, over objection, to show bids defendants and others had made at two Omaha hospitals showing different competitors and lower net prices than those offered the Government installations. The Government statistician admitted he did not know whether the private business in fact was comparable or whether the Government was seeking to compare "an apple and an orange" (R. 300-302); there was no proof that the volume of business, times and manner of delivery, validation of delivery tickets, etc., required by the elaborate Gov-

ernment contracts, pertained to this private business. Nevertheless, the evidence was permitted to go in. The bids showed that at least three dairies which did not wish to bid for the Government business did bid for that of the Omaha hospitals. Tabulation of these bids showed:

DISCOUNTS FROM WHOLESALE LIST PRICES OFFERED AND SUCCESSFUL BIDDER TO UNIVERSITY HOSPITAL

JUNE 16, 1954 THROUGH JUNE 15, 1957.

Contract Period	Goodrich	Roberts	Alamito	Beatrice
6-16-54 to 12-15-54	14.2%*	5%	15%	no bid
12-16-54 to 6-15-55	18.5%*	12½%	0%	6½%
6-16-55 to 12-15-55	15.6%**	15%**	0%	10%
12-16-55 to 6-15-56	12.8%*	0%	11%	10%
6-16-56 to 12-15-56	12.8%*	0%	10%	5%
12-16-56 to 6-15-57	11.2%***	0%	10%****	10%****

* Awarded contract.

** Awarded one-half contract.

*** Awarded contract except for two items.

**** Awarded contract for one item. (Ex 37A-37F)

DISCOUNTS FROM WHOLESALE LIST PRICE OFFERED TO ST. JOSEPH'S HOSPITAL

Date	Royal	Goodrich	Grobeck	Roberts	Alamito	Beatrice
1954 1st half	10%-12½%	12½%*	12½%	8%-13%	0	2%
1954 2nd half	10%	12½%*	12½%	up to 10%	0	2%
1955	10%	10%*	12½%	12% +	no bid	no bid
1956	10%	10%*	15½%	up to 10%	10%	10%
1957	10%	10%*	15½%	0	no bid	10%

(Ex 38A-38L)

* Approximately.

It will be observed from these tabulations that other dairies which did not bid at all for the Government business believed the Omaha hospital business highly desirable and bid steep discounts to obtain it.

GENERAL MARKET CONDITIONS.

A federal milk marketing order required defendants to pay identical prices for raw milk (R. 132-134). *General retail and wholesale prices (on milk and cream) in the Omaha area were uniform before, during and after the period of the asserted conspiracy at the Government installations and the Grand Jury did not allege that the general uniformity was wrongful.*

Nonetheless, on trial the Government proved (over objection), that one Zinsmaster, Sales Manager of Roberts, telephoned one Klesath, then Omaha Manager for petitioner, in late July 1956 (over two years after the supposed conspiracy as to the Government installations supposedly had been formed), and:

> "* * * told me [Klesath] that, 'due to the increase in our cost for fluid milk in the market that we would have a general over-all price increase of one cent a quart on retail and wholesale,' * * * and I told him that I would prepare my prices and be ready to go up on August 1st." (R. 77.)

That just before Christmas 1956,

> "Zinsmaster told me that on January first we would change our wholesale price from ten to twelve per cent to give the grocers a larger margin of profit. I told him I would figure my wholesale price to meet with theirs." (R. 78.)

Whatever these conversations may have meant, or however they may be construed, they patently do not pertain to the asserted conspiracy for which petitioner was indicted and the Court of Appeals so recognizes (p. 50, *infra*).

In arguing to the jury the prosecutor departed entirely from the indictment. He repeatedly asserted that the Government had proved crimes not alleged in the indictment

and did so in context to lead the jury to believe such other asserted crimes were "the" alleged:

> "Mr. Klesath's testimony is some of the most remarkable testimony ever to fall from the lips of a witness in the trial of an anti-trust case. *Here is direct, positive evidence of a price fixing on the wholesale price of milk in a market.* (R. 330.) * * *
>
> "*The crime in this instance is the fixing of prices.*
>
> "The Supreme Court has declared that an agreement to fix prices with a competitor is illegal. *That is the crime.*
>
> "* * * They were going to fix the price of milk on August 1st *in this market*, and *therefore they violated the Antitrust Law.* (R. 332.)
>
> "But to fix it once was not enough. In December of 1956, the same year, Mr. Klesath received another telephone call from Mr. Zinsmaster. This occurred shortly before Christmas, to scheme and plan to increase the price of milk in the Omaha market on January 1, 1957, and on this occasion not only was the wholesale price of milk to be increased but the stores had been complaining, and they also increased the discount from ten to twelve per cent, which in effect, of course, lowered the price of milk to the stores.
>
> "Ladies and gentlemen, *this is another blatant price fixing upon the part of these two men.* Both represented defendants in this case, Roberts and Beatrice." (R. 333.)

INSTRUCTIONS.

The Court of Appeals opinion fails to set forth the instructions. We include them as Appendix B and, to aid analysis, print in bold face the many portions which authorize or direct conviction on charges or theories not made in the indictment. Although three of the instructions correctly informed the jury that petitioner was indicted for allegedly conspiring with two other dairy companies to allocate contracts and maintain non-competitive prices at the two Government installations, in at least ten other places

(leaving out of count incidental references), the jury was told that petitioner was charged with conspiring to fix prices generally on dairy products "in the Omaha area" (R. 381-386); one instruction told the jury that such was "the main charge." A peremptory instruction directed the jury:

> "If you determine that defendant agreed or conspired to fix, stabilize, or control prices, or agreed to maintain uniform and non-competitive prices on dairy products in interstate commerce in the Omaha area, you must find them [sic] guilty notwithstanding the motives or purposes of the defendant in so agreeing or acting." (R. 384, *infra* pp. 69-70.)

At least five times abstract instructions told the jury that a conspiracy to maintain uniform prices was illegal (R. 376, 382, 384, 385; see p. 68 *et seq.*, *infra*). Conversely, the Court denied petitioner's request for an instruction which would have told the jury:

> "The issue in this case is solely whether the Government has proved the defendant guilty of the particular conspiracy defined in the indictment. Evidence, if any, of any other or different conspiracy, is immaterial to the issue you are to decide. The price of milk to the housewives in Omaha or to the grocery stores or other institutions is not in issue in this case." (Court File pp. 214, 215, 78-79, *infra*.)

MOTION TO DISMISS BECAUSE INDICTMENT IMPROPERLY OBTAINED.

Before trial petitioner presented a sworn motion based upon voice recorded statements made by three of the witnesses before the grand jury immediately after their appearances in which they detailed how the prosecutor, in interrogating them, had accused them of perjury when they denied any "deal," repeatedly had asserted there was in fact a conspiracy, that it was an "open and shut" case, and otherwise had invaded the jury's province of determining

whether the witnesses were truthful and whether there was probable cause for believing any crime whatsoever had been committed.

These almost contemporaneously recorded statements were as accurate a description of the occurrences as possible to provide save for minutes of the jury. It was prayed that they be produced and that the indictment be dismissed. The Court failed to rule upon the motion, let the case go to trial, and after verdict denied the motion on the ground that he had examined the minutes *in camera* and determined they did "not support" the motion. At no time either before, during, or after trial, did the prosecutor who handled the grand jury proceedings and participated in the trial deny the allegations of the motion.

COURT OF APPEALS OPINION.

The Court of Appeals held that "although some might regard the case as not a strong one" (op. p. 49, *infra*),

(1) the naked bid pattern at the Government installations, as contrasted with the naked bid patterns at the private hospitals, coupled with the evidence as to the Klesath conversations as to the area generally, was sufficient to overcome the Government's own direct evidence denying the asserted conspiracy given by Alamito's Wholesale Manager and partially given by the Roberts official, and would authorize a jury to find defendant guilty "because [the latter] was not so affirmatively adverse as to necessitate an acquittal";

(2) it could not say that the instructions, although repeatedly authorizing a guilty verdict if the jury believed defendant guilty of any anti-trust offense in the Omaha area, "did not adequately present the issues in a form understandable to the jury";

(3) the trial court would not have abused its discretion had it refused to examine the grand jury minutes,

therefore its *in camera* study of them and resulting denial of the motion to dismiss the indictment did not constitute a secret reception of evidence, a denial of due process, or a deprival of the confrontation guaranty of the Sixth Amendment.

REASONS FOR GRANTING THE WRIT.

This case, in totality, presents, on a simple record, the fundamental question of whether one criminally accused of violating the anti-trust laws has fewer protections in criminal procedures than those accused of other crimes.

Thus the point here as to the prosecutor's misconduct before the grand jury was finally disposed of on the ground, "*in view of the antitrust character of this case [we find nothing] prejudicially offensive to the ends of justice.*" (p. 42, *infra*.) This, despite the fact that the Court of Appeals, after reading the grand jury minutes, was unable to find that in fact the prosecutor had not accused witnesses of perjury, violently commented on their credibility and done other things normally regarded as improper.

And so with other points: the Vavra testimony as to what was said to him by a dead man not shown to have been in a position of relevant authority in an asserted co-conspirator company is held admissible (p. 55, *infra*); yet the Court of Appeals rightly is so unsure of that ruling as not to be willing to rely on the testimony in deciding whether there was sufficient evidence to support the verdict (p. 49, *infra*). Instead, and incongruously, it relies on the Klesath conversations (p. 50, *infra*) which it agrees did not pertain to the "very confined" conspiracy alleged but to area practices (p. 50, *infra*) not claimed to be unlawful, which well could be innocent, and must, in this case, be so presumed.

Instructions which repeatedly authorized or directed conviction on grounds wholly outside the "very confined"

indictment are excused, in substantial part, because this was "a complicated criminal case"; but it was not so until the District Court composed a charge which complicated it by roaming the fields of anti-trust and conspiracy law generally rather than hewing to the "very confined" conspiracy alleged.

In a circumstantial evidence case not even lip service is paid to the rule that the circumstances must be inconsistent with any reasonable hypothesis of innocence. That such hypothesis would be reasonable on this record is shown by the Court of Appeals' statement, "* * * it might have been possible for us to decide the issue otherwise" (p. 50, *infra*).

The Government's burden of proving a defendant guilty beyond a reasonable doubt in any criminal case, anti-trust or otherwise, is not even considered. (*Brinegar* v. *United States*, 338 U. S. 160, 174.) Instead a new, undefined, and lower standard, wholly alien to federal criminal law, is applied in weighing the Government's evidence, *i.e.*, was it "*so affirmatively adverse* [*to the Government's contention*] *as to necessitate an acquittal*" (p. 49, *infra*)? This seems to say that in a criminal case a defendant must prove his innocence. Whatever the "*affirmatively adverse*" doctrine may precisely mean, it was applied, and its application was an inroad into the standard of proof beyond a reasonable doubt. The doctrine is out of accord with the teaching of this Court in *Holland* v. *United States*, 348 U. S. 121, 138 that the Government must always prove every element of an offense beyond a reasonable doubt. The matter is one of serious importance meriting this Court's examination.

The "*affirmatively adverse*" ruling is coupled with the Court's observation (p. 54, *infra*) "that Beatrice has made no record," scarcely an accurate description of the fact that Beatrice stood on its motion for acquittal. How-

ever that may be, implicit in the opinion, is the motif that as long as there was *anything* in the record against Beatrice, whether it established guilt beyond a reasonable doubt or not, Beatrice stood mute at its peril. This, we suggest, comports neither the law nor the record. If the record, at the close of the Government's case did not establish guilt beyond a reasonable doubt, there was no reason for Beatrice to go ahead and its failure so to do could not create an inference against it. Moreover, the Government asked the jury to believe respectable officers of Alamito and Roberts who effectively denied the asserted conspiracy—with the Government thus showing that Alamito and Roberts did not engage in the asserted conspiracy, the case collapsed.

Without arguing the points (they can be explored properly only if the writ be granted), we submit it is a certainty that similar rulings would not have been made in a Mann Act or narcotics case. Explicit and implicit in the instant opinion is the theme "*in view of the antitrust character of this case*", normal standards of criminal procedure and evidence may be relaxed. This Court has never so held. Such a doctrine should be stamped out before it spreads to result in other unjust convictions, personal or corporate, in the many criminal anti-trust cases now pending. Persons accused of business crimes are as entitled to fair treatment as those accused of white slavery or subversion.

We suggest that because of the increasing frequency of criminal anti-trust cases it is in the best interest of the federal court system that this case, in which several facets of the basic problem are presented clearly in a relatively concise and uncomplicated record, be reviewed.

We believe the proper rule to be that when the Anti-

trust Division resorts to criminal proceedings it must accept, and be held to, normal standards of criminal procedure and proof. The Division heretofore has obtained, and can continue to obtain (where warranted), convictions on that basis. If, as here, it procures only a "very confined" indictment, its proofs, arguments and jury instructions must similarly be "very confined," so that the citizen is not placed in peril of conviction on other matters; its proof must show guilt beyond a reasonable doubt. It is not up to a defendant to produce evidence "*affirmatively adverse*" to the Government's contentions unless the latter be established beyond a reasonable doubt.

Sherman Act convictions are dire matters. Not only may they result in imprisonment as well as heavy fines, but they carry the additional consequence, not present in most criminal situations, of creating, under Section 5 of the Clayton Act, a *prima facie* case for treble damage civil liability. Strong reason exists, therefore, for examination of the instant unsettling opinion and for announcement of clear rules emphasizing the necessity of adherence to, rather than relaxation of, traditional criminal standards in antitrust prosecutions.

I.

The Court of Appeals has departed entirely from the substantive standards laid down in *United States* v. *Borden*, 347 U. S. 514. Borden was a *civil* case in which the Government, as here, contended that a "pattern" of bidding for public business in dairy products established collusive bidding in violation of the Sherman Act. Additionally, the Government there adduced evidence that in a few instances some dairies were told by others not to bid for certain business. (This element not present here.) The District Court held against the Government (111 F. Supp. 562). On appeal the Government conceded its case, as made, was insufficient but contended certain evidence had erroneously been ex-

cluded which would have established a Sherman Act violation. This Court held that even had the additional evidence been received it would not establish a case; *a fortiori* the same result should follow in this, a criminal case. (Cf. *Theatre Enterprises, Inc.*, v. *Paramount Film Distributing Corporation*, 346 U. S. 537, 541: "Circumstantial evidence of consciously parallel behavior may have made heavy inroads into the traditional judicial attitude toward conspiracy; but 'conscious parallelism' has not yet read conspiracy out of the Sherman Act entirely.")

Moreover, the Government here produced and vouched for Prall, Alamito's sales manager who testified that he decided on Alamito's bids; because he never knew what his competitors were going to do he attended bid openings and took with him scratch or tally sheets by which he could follow and record the bids. This evidence, true and uncontradicted, cut the heart out of the asserted conspiracy. When there was utterly no evidence of conspiring by either Alamito or Roberts as to the Government business there simply was no one left for Beatrice to have conspired with. Under the evidence, and *Borden*, acquittal should have been directed.

Although the Court of Appeals *describes Borden* at some length (pp. 51-53 *infra*), it never suggests on what tenable ground it may be distinguished; nor how, if a *civil* case was not made in *Borden*, a *criminal* one of proof beyond a reasonable doubt was made here; nor how the Government may proffer Prall as a believable direct witness that there was no conspiracy and simultaneously rely on equivocal circumstantial evidence, insufficient under *Borden*, to make a liar of him.

The opinion makes an argument to the effect that the naked bid "pattern" may be read as indicative of conspiracy. But not a syllable of economic or expert testimony was offered that the bids were inconsistent with competitive be-

havior by men of varying business judgment. On the face of the naked figures it would be fully as logical to say that the parties were in a conspiracy in 1951 and 1952 when twice all three refused to offer any discount, or in 1953 when on one occasion Beatrice put in no bid whatsoever and Alamito and Roberts offered no discount.

The Government itself proved that in late 1953 Roberts got into a dispute with the Air Force over its practice of taking what Roberts believed to be unwarranted cash discounts; ample reason was shown for Roberts not to do business with the Air Force for some time thereafter. The opinion says that the non-existent conspiracy must have ceased with the bids for the period commencing June 1, 1957, (and here the opinion shifts its system of accounting from entire to partial contracts), because at that time, although Alamito bid 2% for the *entire* contract and Beatrice bid 1% Roberts bid 6% (not 8% as erroneously stated in the opinion), *for a portion of the contract*—milk in gallons. The conclusion is obviously pure guess work.

The vice of the situation is supposed to adhere in the fact that commencing March 1, 1954, Alamito had the Air Base for six months, Beatrice then had it for six months, Alamito got it for six months, then Beatrice took it away for a quarter. In the following quarter it swung back to Alamito, then it went to Beatrice. Since the supposed conspiracy supposedly has been over the principal contract has stayed with Alamito. And by June 1, 1958 no one offered a discount! Such a history rather than showing rigidity or unreality, shows that the business swung back and forth *before and during* the indictment period; that the competitors repeatedly changed positions trying to outguess each other and yet to obtain the business on a profitable basis. The proof is less sufficient to establish conspiracy than it was in *Borden*. We say, *and no witness has testified to the contrary*, that it shows perfect nip and tuck competition.

There can be no bid business on a standard item in which some years after the bidding has taken place, someone cannot go back and say that if A had done this, or B done that, the business would have gone differently. If such divination by hindsight is permitted to take the place of evidence and establish criminal conspiracy, many honest businessmen are in imminent danger of jail.

II.

It is frightening that the jury was not merely authorized to bring in a guilty verdict on grounds—an "Omaha" conspiracy—not alleged in the indictment but was given a preemptory instruction so to do (pp. 69-70, *infra*).

Heretofore it has been constitutional doctrine that permitting, much less directing, conviction on a charge not contained in the indictment should be regarded either as a denial of due process (*DeJonge* v. *Oregon*, 299 U. S. 353, 362; *Thornhill* v. *Alabama*, 310 U.S. 88, 96) or as an amendment of the indictment (*Stirone* v. *United States*, 361 U. S. 212, 217-219) which ever since *Ex parte Bain*, 121 U. S. 1, has been regarded as offensive to the Fifth Amendment. Those principles are set at naught by the instant opinion.

The prices, either of fluid milk or other dairy products on the Omaha general market, were immaterial. The bids to the Government installations which were placed in evidence all contained their own prices in dollar figures and discount terms. Since it was not alleged that these prices were too high or too low with respect to Omaha area prices, reference to the latter was wholly immaterial and improper.

But the Omaha prices were put in (over objection), and they were uniform. The prosecutor put in the Klesath conversations, which the Court of Appeals agrees pertained to area prices and not to the Government installations, and

then repeatedly told the jury that the Omaha prices had been fixed in criminal violation of the very law under which petitioner had been indicted (See p. 10, *supra*). Thus stood the case when the District Court composed its charge. The court permitted counsel to tender instructions but afforded no opportunity for discussion of them, or of the charge before it was delivered. Much grossly misleading and utterly improper material was inserted that neither side had suggested.

The charge contains much improper abstract exhortation, is difficult to follow, and its contradictory instructions admit of no reconciliation. It ties the Klesath conversations into the Government business (p. 67, *infra*) with which the Court of Appeals finds the conversations were not concerned. The Court of Appeals excuses the charge on the ground that the jury probably was not confused. This is neither the legal test nor is it reasonable. We find at least 18 places where the charge travels beyond the indictment to refer to the issue as one "to fix, stabilize, or control prices, or * * * to maintain uniform and non-competitive prices of dairy products in interstate commerce within the Omaha area" (pp. 69-70, *infra*), or as concerning "a combination or conspiracy to fix, control or maintain prices of dairy products in the Omaha area" (p. 70, *infra*), etc. At other places the jury was told it must find beyond a reasonable doubt *not that the conspiracy alleged in the indictment was proved* but that "*a*" conspiracy existed. As against at least 18 of these variations we make only 7 instances in which the jury, one way or another, was directed to the actual charge of the indictment.

In *Bollenbach* v. *United States*, 326 U. S. 607, 613 this Court said:

> "* * * Here then are three different and conflicting theories regarding a charge designed to guide the jury in determining guilt, and yet we are asked to

> sustain the conviction on the assumption that the jury was properly guided. * * * A conviction ought not to rest on an equivocal direction to the jury on a basic issue."

The situation at bar is worse. There is reason to think that the District Court itself had become confused for it refused to give an instruction that prices to the Omaha housewife or grocery stores were not in issue (pp. 78-79, *infra*). Paraphrasing from *Stirone* v. *United States*, 361 U. S. 212, 219:

> "* * * because of the court's admission of evidence and under its charge this [believed Omaha dairy products offense] might have been the basis upon which the trial jury convicted petitioner. If so [it] was convicted on a charge the grand jury never made against [it]. This was fatal error."

(*Cf. Grunewald* v. *United States*, 353 U. S. 391, 415; *Yates* v. *United States*, 354 U. S. 298, 312.)

Antitrust cases frequently lend themselves to confusion —the statute is in broad terms but usually is applied against a fairly complex business transaction, only certain features of which are alleged to be illegal. The jury, constitutionally, can bring in a verdict only on those features. In the proper exercise of its supervisory powers we respectfully suggest it would be appropriate for this Court to point out that there is a special duty on trial judges to strive for the utmost clarity of instructions in such cases rather than to stray afield.

III.

That there was error in what should have been a relatively simple trial the Court of Appeals agrees. However, it says no single error was sufficiently prejudicial to require reversal. We respectfully disagree. But it is clear that the Court ignored entirely, and failed to assess,

the cumulative effect of a chain of errors. It departed from the standard of *Kotteakos* v. *United States*, 328 U. S. 750, 764 that it "must take account of what the error meant to [the jury], not singled out and standing alone, but in relation to all else that happened."

Nor did the Court of Appeals give any consideration to the accepted doctrine that errors which might not require reversal in a clear case, require it in a close one which might have gone either way as the Court says was the fact here (p. 50, *infra*). The Court of Appeals has fallen into the same error in assessing prejudice as it did in *Janko* v. *United States*, 281 F. 2d 156 where it held newspaper publicity was not prejudicial. This Court reversed on the petition for certiorari (366 U. S. 716). Let us list some of the prejudicial errors here:

1. Major Anderson, handsome and in uniform, testified that his secretary said on the occasion of a bid opening, "I wonder whose turn it is today; these bids are rotated among the firms" (R. 139-140). This was given, at the prosecution's peril, after strenuous objections. There was no possible way by which it could be made competent. Nevertheless, the prosecutor persisted. The viciously prejudicial accusation was made. It was then stricken. The Court of Appeals says that is a sufficient cure. However, that, "all practicing lawyers know to be unmitigated fiction." (*Krulewitch* v. *United States*, 336 U. S. 440, 453.)

2. One Vavra, a one-time route driver for Alamito Dairy, testified, over objection, that his deceased former supervisor McCarthy had told him it was the policy of Alamito and Beatrice to switch the Air Force business every six months (R. 210-212). No foundation was laid to show that the deceased McCarthy ever had been in position to determine or to know what the "policy" of his own employer, Alamito, was, and certainly not that of Beatrice. McCarthy himself, if alive, could not have given this evidence even as against *Alamito* for his authority was

not shown, nor was the declaration one in furtherance of the conspiracy. (*Fiswick* v. *United States*, 329 U. S. 211, 217; *Lutwak* v. *United States*, 344 U. S. 604, 617; *Flintkote Company* v. *Lysfjord*, 246 F. 2d 368 (9 Cir., 1957), c.d. 355 U. S. 835.) But here it was held admissible in double hearsay form against *Beatrice* on the theory that there was unspecified "independent proof" of the asserted conspiracy (p. 55, *infra*). This scarcely disposes of the point that there was no proof sufficient to show McCarthy was in a position of relevant authority to make admissions which would have been admissible even as against Alamito. Apparently the "independent proof" which would justify admissions of a qualified agent of alleged co-conspirator Alamito is the Klesath-Zinsmaster conversations; however, *those did not pertain to the conspiracy alleged but to area practices.*

3. The Klesath conversations are construed to prove that Beatrice and Roberts agreed to fix general prices to Omaha housewives and retailers. We demur; but in any event the Court of Appeals held these conversations did *not* pertain to the asserted conspiracy at issue. This evidence again should not have been received.

4. In any event petitioner was faced with (a) an inadmissible declaration by an Air Force secretary that "the firms" rotate bids; (b) a so-called admission by an unqualified dead man that his employer, Alamito, and Beatrice had a "policy" of shifting the Air Force business; (c) an alleged "Omaha" price-fixing conspiracy not alleged in the indictment; (d) a vehement argument by the prosecutor that the "Klesath evidence as to Omaha was some of the most remarkable testimony ever to come from the mouth of a witness in an anti-trust case" and showed "blatant" crimes, or "the" crime; (e) instructions from the trial court repeatedly authorizing and directing the jury to return a verdict of guilty on an "impermissible ground." (*Cf. Grunewald* v. *United States*, 353 U. S. 391, 415.)

The cumulative effect of a continuous chain of prejudicial errors was bound to, and did, result in a verdict against petitioner. Due process may not require an error-free trial but it does require that the sum total of a chain of error, in what at best was a close case for the Government, be considered in determining whether a trial was fair (*Kotteakos* v. *United States*, 328 U. S. 750, 764). However, nowhere did the Court of Appeals do this. In failing so to do it has departed so far from accepted standards of judicial review as to warrant supervisory review by this Court.

IV.

The opinion cites many cases dealing with generalities as to grand juries but avoids the real problem here:

An affidavit was filed, not in general terms but averring specifically and in detail, that three specific witnesses had been accused of perjury, or other misconduct, by the prosecutor before the grand jury and that the grand jury repeatedly had been told by the prosecutor that crime in fact had been committed. If this was true, the indictment should have been dismissed. *United States* v. *Wells*, 163 F. 313, 325-326. The prosecutor made no denial whatsoever of the charges against him, nor did he assert, until long after the trial, that the affidavit was any form of hearsay (a debatable question, *cf. Meyer* v. *T. J. McCarthy Steamship Company*, 183 F. Supp. 654, 657).

Production of the minutes covering testimony of the three witnesses would have settled the matter. They were not produced. Instead the District Court read them secretly and announced that they did not support the motion. On appeal, the minutes of course, were not part of the record. The Court of Appeals sent for, and read them. It then found, not that the prosecutor had not done precisely what he was charged with, but that it found nothing in the grand

jury proceedings "which, in view of the anti-trust character of this case, is prejudicially offensive to the ends of justice" (p. 42, *infra*). What the court's finding means, what standards the Court applied, no one, under this Star Chamber procedure, can have any possible idea.

Certainly the opinion is consistent with the view that in anti-trust proceedings prosecutors *can* tell grand juries that witnesses are lying and *can* tell them that crime has been committed.

Evidence has been received and weighed against petitioner in violation of its right under the Sixth Amendment to be confronted with the evidence against it and in violation of the due process guarantee of the Fifth Amendment.

CONCLUSION.

It is respectfully submitted that the Government's case fell so far short of proving the commission of a crime beyond a reasonable doubt that this Court may believe it appropriate on this petition to reverse the judgment with directions for entry of one of acquittal. Certainly if that not be done, such grave questions are raised that the petition should be granted.

Respectfully submitted,

GEORGE B. CHRISTENSEN,
Counsel for Petitioner.

WINSTON, STRAWN, SMITH & PATTERSON,
38 South Dearborn Street,
Chicago 3, Illinois,

FITZGERALD, HAMER, BROWN & LEAHY,
Insurance Building,
Omaha 2, Nebraska,
Of Counsel.

February 12, 1963.

APPENDIX A.

UNITED STATES COURT OF APPEALS

For the Eighth Circuit.

No. 16,899

Beatrice Foods Co., *Appellant*,
vs.
United States of America, *Appellee*.

Appeal from the United States District Court for the District of Nebraska.

[January 2, 1963.]

Before VAN OOSTERHOUT and BLACKMUN, *Circuit Judges*, and HENLEY, *District Judge*.

BLACKMUN, *Circuit Judge*.

This is an appeal from the judgment entered upon a jury verdict that the defendant Beatrice Foods Co. was guilty of a conspiracy made illegal by § 1, as amended, of the Sherman Act, 15 U.S.C. § 1. A fine of $15,000 was imposed.

The indictment was returned in August 1958. It named Beatrice, Roberts Dairy Company and Alamito Dairy Company as defendants. All three defendants were engaged in the dairy business in the Omaha-Council Bluffs area. The indictment contained one count which charged that from January 1954 to April 1957 the defendants, in

violation of the Act, "have engaged in a combination and conspiracy to eliminate and suppress competition in the sale of milk and cream" to the United States Veterans Administration Hospital in Omaha and to the United States Offutt Air Force Base near that city. Some of the specific features of the charge are quoted in the margin.[1]

Roberts and Alamito submitted pleas of nolo contendere. These were eventually accepted by the court. Those two defendants were then adjudged guilty and a fine of $5,000 was imposed upon each of them.

Beatrice, the remaining defendant, moved, pursuant to Rule 6(b)(2), F.R.Cr.P., to dismiss the indictment for the reason that the grand jury which returned it "was drawn from a jury list which was not properly or lawfully selected". After a hearing this motion was denied. Beatrice then entered a plea of not guilty. On the basis of an affidavit of one of its attorneys Beatrice also moved

1. "The aforesaid combination and conspiracy has consisted of a continuing agreement, understanding, and concert of action among the defendants the substantial terms of which were:

(a) To fix and establish non-competitive prices and discounts for milk and cream sold and distributed to the Offutt AFB;

(b) To fix and establish non-competitive prices and discounts for milk and cream sold and distributed by the defendants to the Veterans Hospital;

(c) To allocate to the defendant Roberts, the bid contract business of supplying milk and cream to the Veterans Hospital;

(d) To alternately allocate to the defendants Alamito and Beatrice the bid contract business of supplying milk and cream to the Offutt AFB.

* * * * *

"The combination and conspiracy alleged in this indictment has had, among other things, the following effects:

(a) Prices paid by the Veterans Hospital and Offutt AFB for milk and cream have been artificially fixed at high and non-competitive levels; * * *

(f) Competition among defendants in the sale of milk and cream to the Offutt AFB and the Veterans Hospital has been substantially lessened and eliminated."

to quash the indictment "because the indicting grand jury's sessions and deliberations were tainted and defendant was prejudiced by repeated acts of misconduct by the United States attorneys before said jury".

The case proceeded to trial. At the close of the government's evidence, Beatrice moved for a judgment of acquittal and rested. The adverse verdict was returned and judgment was entered. Beatrice then renewed its motions for dismissal of the indictment and for judgment of acquittal and asked in the alternative for a new trial. These motions were all denied.

The defense urges here (1) improper selection of the grand jury; (2) misconduct of government counsel before the grand jury; (3) insufficiency of the evidence; (4) error in the reception of evidence, and (5) error in the instructions. We examine these points in turn and recite the pertinent facts as each is considered.

1. *The challenge to the grand jury array.* The governing statutes are 28 U.S.C.A. §§ 1861 and 1864. The former[2] prescribes as qualifications for both grand and petit jurors (a) United States citizenship; (b) attained age of 21 years; (c) one year's residence within the judicial district; (d) absence of a criminal record of the kind described in the statute; (e) ability to read, write, speak and understand English; and (f) mental and physical capacity

2. § 1861. Qualifications of Federal jurors

Any citizen of the United States who has attained the age of twenty one years and who has resided for a period of one year within the judicial district, is competent to serve as a grand or petit juror unless—

(1) He has been convicted in a State or Federal court of record of a crime punishable by imprisonment for more than one year and his civil rights have not been restored by pardon or amnesty.

(2) He is unable to read, write, speak, and understand the English language.

(3) He is incapable, by reason of mental or physical infirmities to render efficient jury service.

to render efficient jury service. This section was given its present form on September 9, 1957, by the Civil Rights Act of 1957, Pub. L. 85-315, Part V, § 152, 71 Stat. 634, 638. Theretofore, the statute had required only residence in the district, rather than at least one year's residence there, and had also provided that one who was incompetent to serve as a juror by the law of the state where the federal court sat was also incompetent to serve as a federal juror.

Section 1864[3] provides that the names of grand jurors shall be drawn from a box containing the names of not less than 300 then qualified persons and that the box shall be refilled from time to time by the clerk of the court and a jury commissioner having prescribed qualifications.

Beatrice's position is that § 1864 is mandatory and requires the clerk and the commissioner to place the names of 300 or more qualified persons in the box; that this duty of selection may not be delegated; that the procedure the clerk followed in selecting names for this grand jury did not meet the statutory requirements; and that Beatrice need not demonstrate individual prejudice to it by the selection procedures employed.

At the hearing on the motion to dismiss the indictment the following facts were developed and are not in dispute:

3. § 1864. Manner of drawing; jury commissioners and their compensation

The names of grand and petit jurors shall be publicly drawn from a box containing the names of not less than three hundred qualified persons at the time of each drawing.

The jury box shall from time to time be refilled by the clerk of court, or his deputy, and a jury commissioner, appointed by the court.

• • • • •

The jury commissioner and the clerk, or his deputy, shall alternately place one name in the jury box without reference to party affiliations, until the box shall contain at least 300 names or such larger number as the court determines.

• • • • •

Mary A. Mullin was the clerk. She served in that capacity since 1939. The jury commissioner was G. V. Middleton. He was appointed in 1955. He died in July 1958. The court's order for the grand jury was issued on October 23, 1957, only one month and two weeks after § 1861 was amended. The jury was drawn on November 6, was empaneled the following February, was excused for a time, and was reconvened in August 1958 when the indictment of the three defendants was returned.

Miss Mullin, since her appointment as clerk, maintained a list of prospective jurors. She kept this "revised constantly". Names and addresses were placed on cards. Names of women were on blue cards and those of men were on white cards. Middleton maintained his own card record. His was separate and apart from the clerk's and was not under his direction or supervision. His cards were orange. Miss Mullin had no knowledge as to how Middleton obtained his names. When this grand jury was empaneled Miss Mullin placed not less than 150 of her cards in the box and Middleton placed not less than 150 of his cards there. The clerk and Middleton did this by placing cards one at a time alternately in the box. Miss Mullin testified that she apportioned blue cards and white cards consistently but that she had no idea as to the proportion of the one group to the other.

The clerk employed the sponsor system practice of sending to certain persons in the district requests for recommendations of prospective federal jurors. The form she used for this purpose quoted § 1871 in full. It provided choices for names of men or of women or of both men and women; upon any particular use of this form she crossed out two of these three alternatives. She in fact requested names of persons of both sexes from time to time. On at least one occasion she used the form to ask for names of colored men.

When Miss Mullin received recommendations from her sources she checked the names submitted against her existing list. She then sent a mimeographed questionnaire to each person whose name was not already on her list. She did not add a name to the list upon its mere presentation by a sponsor.

The questionnaires were of two types. Each bore the name of the clerk and advised the recipient that he was a prospective federal juror. Each asked his age, occupation and address, and whether he was a voter. One type, the older, asked whether he was a federal employee. The other asked the name of his employer and whether he owned real estate in his own name. Miss Mullin conducted no personal interview with any prospective juror.

There was no evidence presented as to how the names on Middleton's list were selected.

It is important to note that Beatrice does not attack the indictment on the grounds (a) that any particular person on this grand jury was in any way not qualified, or (b) that the required number of names were not in the jury box, or (c) that the jury was not representative of the community in that an eligible group had been excluded in its selection. See, as to this last factor, *Thiel* v. *Southern Pacific Co.* 1946, 328 U. S. 217, 220; *Ballard* v. *United States* 1946, 329 U. S. 187, 195; *Hoyt* v. *Florida* 1961, 368 U. S. 57, 59; *Smith* v. *Texas* 1940, 311 U. S. 128. Neither has Beatrice suggested or offered to prove individual prejudice to it as a defendant.

The attack, instead is directed to claimed deficiencies in the mechanics of the selective process. It is argued that the letters to the sponsors and the questionnaires "do not begin to provide sufficient information to determine whether or not that person is qualified to act as a federal juror under § 1861, particularly with respect to the Eng-

lish language requirement, criminal record, infirmities, and the one year residence newly prescribed by the 1957 amendment. It is then said that the record clearly establishes that Miss Mullin did not know whether the names she placed in the box were those of qualified persons, that this is a breach of statutory duty, and that it is fatal to the indictment.

It was suggested long ago that the placing of names of *qualified* persons in the jury box is mandatory. *United States* v. *Chaires*, C. C. N. D. Fla., 1889, 40 F. 820, 821. Since then, some courts have specifically so held. *United States* v. *Silverman*, D. Conn., 1955, 129 F. Supp. 496, 511; *United States* v. *Brandt*, N. D. Ohio, 1955, 139 F. Supp. 362, 365. It has been said, too, that the duty of selection cannot be delegated by jury officials. *Glasser* v. *United States* 1942, 315 U. S. 60, 85. However, Congress has prescribed no particular method of jury selection. "The choice of the means * * * rests largely in the sound discretion of the trial courts and their officers" under the guidance of the pertinent statutes. *Thiel* v. *Southern Pacific Co.*, *supra*, pp. 220-21 of 328 U. S.; *Glasser* v. *United States*, *supra*, p. 86 of 315 U. S. There is a presumption that the jury officials have discharged their duties properly. *Poliafico* v. *United States*, 6 Cir. 1956, 237 F. 2d 97, 110, cert. den. 352 U. S. 1025; *United States* v. *Fujimoto*, D. Hawaii 1952, 105 F. Supp. 727, 729. When the defense claims the existence of a fatal flaw in the selection process it has the burden of overcoming that presumption. *Frazier* v. *United States* 1948, 335 U. S. 497, 503; *United States* v. *Silverman*, *supra*, p. 511 of 129 F. Supp.; *Walker* v. *United States*, 8 Cir. 1937, 93 F. 2d 383, 392, cert. den. 303 U. S. 644; *Bailey* v. *Henslee*, 8 Cir., 1961, 287 F. 2d 936, 942, cert. den. 368 U. S. 871.

Accepting all this, we are not persuaded by Beatrice's challenge to the array:

(a) When the jury officials themselves are the ones who ultimately determine a juror's qualification, the sponsor system is not in itself an invalidating factor. *Walker* v. *United States, supra*, p. 391 of 93 F. 2d, where this court said that this "was not a delegation, but a discharge of duty"; *United States* v. *Dennis*, 2 Cir., 1950, 183 F. 2d 201, 216-24, affirmed 341 U. S. 494; *Padgett* v. *Buxton-Smith Mercantile Co.*, 10 Cir., 1960, 283 F. 2d 597, 598, cert. den. 365 U. S. 828; *United States* v. *Silverman, supra*, p. 510 of 129 F. Supp.; *United States* v. *Silverman*, D. Conn., 1955, 132 F. Supp. 820, 823-27; *United States* v. *Romano*, D. Conn., 1961, 191 F. Supp. 772; *United States* v. *Brandt*, N. D. Ohio, 1955, 139 F. Supp. 349, 360; *United States* v. *Hoffa*, S. D. Fla. 1952, 205 F. Supp. 710, 719-20. Here a sponsor's recommendation was not the sole feature of the selection process. It was coupled as to each prospect with a questionnaire directed to most of the qualifications specified by the statute. Although certain of the requests to sponsors were limited as to sex, the requests, taken as a group, were not so limited and the one requesting names of Negro males was sent to a deputy federal court clerk who was himself a Negro and who reasonably might be expected to possess usefully wide acquaintanceship with others of his race. Also, the law does not contemplate that the jury officials be personally acquainted with each prospective juror. *Walker* v. *United States, supra*, p. 391 of 93 F. 2d.

(b) The fact that the clerk and the jury commissioner maintained separate lists does not seem to us to disqualify the panel. We find nothing in § 1864 which requires that both jury officials pass upon the qualifications of each prospective juror even though it obviously is desirable that they do so. The policy of the statute is that the jury box be refilled by both acting alternately. It does not appear to go so far as to require agreement upon each name.

Compare *United States* v. *Clancy*, 7 Cir., 1960, 276 F. 2d 617, 625, reversed on other grounds, 365 U.S. 312; *Local 36 etc.*, v. *United States*, 9 Cir., 1949, 177 F. 2d 320, 341, cert. den. 339 U.S. 947.

(c) The questionnaires employed were not as desirably complete as they might have been. They did not inquire, for example, as to a prospect's fluency in English, as to his criminal record and as to his mental and physical capacities. Yet they did advise him of the purpose of the questionnaire itself and they did inquire as to his being a voter. The filling out of the form and its return would result in some indication of the prospect's language ability and of his infirmities. Voting status under Nebraska law would presumably show United States citizenship, at least six months' residence in the district, R.R.S. Neb. 1943 §32-102, and something as to criminal record, R.R.S. Neb. §§ 29-112 and 29-102. The information requested as to age, occupation and employer is not completely unrevealing as to capacity. Furthermore, the letter to each sponsor quoted § 1861. The sponsor therefore knew exactly what was required for those he was to recommend as prospective jurors. We are not free to presume that he ignored these requirements.

(d) It is evident, as Beatrice urges, that the questionnaires were not so complete or so helpfully informative as the one given as an xample in the September 1960 Report of the Judicial Conference Committee on the Operation of the Jury System, 26 F.R.D. 409, 507-08. But such deficiencies as they possessed were largely overcome by the answers which were necessarily forthcoming, by the natural tendency to make one's physical infirmities known, and by the court's own authority to excuse unqualified prospective jurors. *United States* v. *Brandt*, supra, p. 365 of 139 F. Supp. The 1960 Report itself states that its sug-

gested questionnaire "need not be rigidly adhered to". 26 F.R.D. 436.

(e) Nor do we think the fact that the box may have contained names which were on the jury officials' respective lists prior to the 1957 amendment imposing the one-year residence requirement is fatal. See *Glasser* v. *United States*, supra, p. 65 of 315 U.S. Compare *United States* v. *Dennis*, supra, pp. 217-18 of 183 F. 2d; *United States* v. *Flynn*, 2 Cir., 1954, 216 F. 2d 354, 385, cert. den. 348 U. S. 909. This jury was drawn less than two months after that amendment. And the evidence does not disclose that the residency requirement was not met as to these grand jurors. See *United States* v. *Austrew*, D. Md., 1961, 190 F. Supp. 632, 634.

(f) We do not regard *United States* v. *Silverman*, supra, 129 F. Supp. 496, and *United States* v. *Brandt*, supra, 139 F. Supp. 362, as opposing authority. In *Silverman* the request to sponsors gave no information whatever as to the statutory qualifications and the questionnaires employed were sent out only after the drawing. Thus there was no determination by the jury officials themselves of the qualifications of the prospects. Compare the disposition of the second challenge in *United States* v. *Silverman*, supra, pp. 823-27 of 132 F. Supp. In *Brandt* the challenge to the array was not successful.

(g) The facts here fall far short of the more material situation where an entire cohesive group is excluded in the jury selection process. There the jury system itself is threatened and as a consequence prejudice to the particular defendant need not be demonstrated. *Thiel* v. *Southern Pacific Co.*, supra, pp. 220-21 and 225 of 328 U.S.; *Ballard* v. *United States*, supra, p. 195 of 329 U.S.

(h) Although perfection in jury selection is of course desired, it is too much to expect that the system in every

federal judicial district will be conducted and will operate with the precision of a fine timepiece. Perfect performance is not required. *United States* v. *Brandt*, supra, p. 365 of 139 F. Supp. This is why we have the many safeguards consisting of the use of the box itself, the drawing of names from it, the large number of names required, and the like. At the very most, there were mere irregularities in the selection of the grand jury which indicted Beatrice and its codefendants. In the absence of individual prejudice to the defendant, these do not justify dismissal of the indictment. *Agnew* v. *United States*, 1897, 165 U.S. 36, 44; *Young* v. *United States*, D.C. Cir., 1954, 212 F. 2d 236, 238-39 and footnote 5, cert. den. 347 U.S. 1015. See *Frazier* v. *United States*, supra, p. 503-04 of 335 U.S. Compare *United States* v. *Greenberg*, S.D. N.Y., 1961, 200 F. Supp 382, 387. We equate this feature of this case with the situations involved in *United States* v. *Clancy*, 7 Cir., 1960, 276 F. 2d 617, 625, 631-32, reversed on other grounds, 365 U.S. 312; *United States* v. *Dennis*, supra, 2 Cir., 1950, 183 F. 2d 201; *Local 36, etc.*, v. *United States*, supra, 9 Cir., 1949, 177 F. 2d 320, 341; *Abdul* v. *United States*, 9 Cir., 1960, 278 F. 2d 234, 235, cert. den. 364 U.S. 832; *Romney* v. *United States*, D.C. Cir., 1948, 167 F. 2d 521, 527, cert. den. 334 U.S. 847; *Padgett* v. *Buxton-Smith Mercantile Co.*, supra, 10 Cir., 1960, 283 F. 2d 597, 599. See *Brookman* v. *United States*, 8 Cir., 1925, 8 F. 2d 803, 806-07; *Gaughan* v. *United States*, 8 Cir., 1927, 19 F. 2d 897, 898-99. Compare *Walker* v. *United States*, supra, p. 391 of 93 F. 2d.

We note, incidentally, that the Nebraska jury selection system employed by this clerk and this jury commissioner was carefully reviewed once before and was upheld by Chief District Judge Delehant in an unreported memorandum filed September 24, 1956, in *United States* v. *Brown*, reversed on other grounds, 8 Cir., 1957, 245 F. 2d

549. We, too, conclude that the system was not disqualifying and that the challenge to the array must fail.

2. *Misconduct of government counsel before the grand jury.* On the day the trial was to begin, more than thirty-two months after the the return of the indictment, Beatrice moved that the grand jury minutes be produced for inspection by the defense and the court and that the indictment be dismissed because of misconduct of non-local government attorneys before the grand jury. This motion was supported by an affidavit of one of the attorneys for Beatrice to the effect that, immediately following their appearance before the grand jury in 1958, three witnesses, all agents or employees of Roberts, recorded on tape what had transpired before the grand jury and that the tape reflects instances of belligerency toward these witnesses, accusations of lying, threats of prosecution for perjury, and assertions of the very matter under consideration by the grand jury. In denying this motion and its renewal after judgment the court stated that government counsel had produced the grand jury transcript "and the Court having carefully read and studied the entire Grand Jury transcript in camera, finds that the allegations contained in the affidavit * * * are not supported by the record and therefore are without foundation and should be overruled".

Beatrice argues here that the affidavit stands uncontradicted in the record; that the conduct of government counsel was an abuse of the limited function of the prosecutor before the grand jury; that Beatrice was thereby deprived of its right to a fair and unprejudiced investigation; and that the paucity of evidence at the trial convincingly demonstrates that the indictment was returned because of prosecutorial compulsion rather than because of the force of the evidence. This court indicated at the oral argument that it would call up the grand jury transcript for its

own in camera examination. Defense counsel since then have suggested that the same constitutional infirmities attach to appellate inspection as to district court review.

Grand jury proceedings, of course, have long enjoyed a character almost sacrosanct. "Grand jury testimony is ordinarily confidential". *United States* v. *Socony-Vacuum Oil Co.*, 1940, 310 U. S. 150, 233. But the Supreme Court in that case also said, p. 234, that "after the grand jury's functions are ended, disclosure is wholly proper where the ends of justice require it". This is specifically recognized by Rule 6(e), F.R. Cr.P.

This "indispensible secrecy of grand jury proceedings", as Mr. Justice Frankfurter has typified it in *United States* v. *Johnson*, 1943, 319 U.S. 503, 513,

> "must not be broken except where there is a compelling necessity. There are instances when that need will outweigh the countervailing policy. But they must be shown with particularity". *United States* v. *Procter & Gamble Co.*, 1958, 356 U. S. 677, 682.

And in *Pittsburgh Plate Glass Co.* v. *United States*, 1959, 360 U.S. 395, 396, 399-400, the Supreme Court has told us that, under Rule 6(e), inspection of the grand jury minutes has been committed "to the sound discretion of the trial judge"; that the defense does not have a "right" to grand jury minutes; and that instead it has the burden to show "a particularized need" which "outweighs the policy of secrecy".

No case precisely in point here has been cited to us. Most have applied the *Pittsburgh Plate Glass* standard to situations of alleged or suspected discrepancy between a witness' testimony at the trial and that before the grand jury. See, for example, *Berry* v. *United States*, 8 Cir., 1961, 295 F. 2d 192, 194-95, cert. den. 368 U. S. 955; *Travis* v. *United States*, 10 Cir., 1959, 269 F. 2d 928, 945-46, re-

versed on other grounds 364 U.S. 631. General allegations usually have been frowned upon. *United States* v. *Coduto*, 7 Cir., 1960, 284 F. 2d 464, 468, cert. den. 365 U.S. 881; *Ogden* v. *United States*, 9 Cir., 1962, 303 F. 2d 724, 741-42. In camera inspection by the trial court has been suggested, see *Brilliant* v. *United States*, 8 Cir., 1962, 297 F. 2d 385, 391, cert. den. 369 U.S. 871, and in some cases has been employed within limits and not disapproved. The Second Circuit seems to have gone so far as to require in camera inspection of at least a portion of the grand jury minutes whenever a suggestion has been made as to discrepancy. *United States* v. *Hernandez*, 1960, 282 F. 2d 71; 1961, 290 F. 2d 86, 88-89; *United States* v. *Giampa*, 1961, 290 F. 2d 83, 85. Other courts, including our own, have recognized the drawbacks of routinely compelling trial judges to indulge in such inspection and have upheld, as a non-abused discretionary matter, a trial court's refusal to inspect the grand jury transcript. *Pittsburgh Plate Glass Co.* v. *United States*, 4 Cir., 1958, 260 F. 2d 397, 404, affirmed, supra, 360 U.S. 395; *Berry* v. *United States*, supra; *Brilliant* v. *United States*, supra; *Hance* v. *United States*, 8 Cir., 1962, 299 F. 2d 389, 398; *Banks* v. *United States*, 8 Cir., 1953, 204 F. 2d 666, 669-70, cert. granted and case remanded on other grounds, 348 U. S. 905; *Travis* v. *United States*, supra.

In the present case are a number of facts, each perhaps of no great significance when considered alone, which seem in the aggregate at least to afford a tone to this demand from the defense: (a) The motion was presented to the court more than two and one-half years after the indictment was returned despite the fact that the affidavit alleged that the recorded statements were made immediately following the witnesses' appearance before the grand jury. We are not saying that the motion was untimely for it was made before trial as required by Rule 12(b)(2).

(b) The supporting affidavit was that of counsel and was sworn to on the day of the trial. No supporting affidavit from any of the three witnesses was presented. (c) The witnesses in question were only three of many which appeared before the grand jury. (d) The witnesses were agents or employees of Roberts, one of the defendants under consideration. (e) The affidavit itself indicates that recorded statements were taken from other witnesses but it contains no similar reference to any of these. (f) One of the three witnesses testified at the trial.

Under these circumstances we cannot say that the defense has established a particularized need for the grand jury transcript. There is authority to the effect that a prosecutor, while before the grand jury, may not participate in its deliberations or express opinions on questions of fact or attempt to influence the finding. See, for example, *United States* v. *Wells*, D. Idaho, 1908, 163 F. 313, 325-26. But the courts generally have been most cautious in invalidating indictments for alleged grand jury misconduct of the prosecutor. See *McKinney* v. *United States*, 8 Cir., 1912, 199 F. 25, 28-29; *United States* v. *Rintelen*, S.D. N.Y., 1916, 235 F. 787, 794-95.

Nor is it effective or significant to say that the attorney's affidavit stands alone and uncontradicted in the record. The burden is on the defense. The situation is not unlike that in *Glasser* v. *United States*, supra, where the Supreme Court said, p. 87 of 315 U.S., "the formal affidavit alone, even though uncontroverted, is not enough."

We recognize that this is a situation where the traditional reasons for grand jury secrecy (see, for example, *United States* v. *Rose*, 3 Cir., 1954, 215 F. 2d 617, 628-29, 8 Wigmore, Evidence (McNaughton Revision 1961), § 2360), may have little application. But there is a strong presumption of regularity accorded to the findings of a grand

jury. *United States* v. *Nunan*, 2 Cir., 1956, 236 F. 2d 576, 594, cert. den. 353 U. S. 912. The "ends of justice" are the guide. We do not see in the allegations of this affidavit anything which suggests that the ends of justice require that the whole or any part of this transcript be made available to the defendant. It follows that the trial court would not have abused its discretion had it refused to examine the grand jury minutes. It follows further that there can then be no error in the district court's inspection of the transcript in camera and in its subsequent denial of the defense motion, and that this does not constitute, as Beatrice suggests, a secret reception of evidence or a denial of due process or a deprival of the confrontation guaranty of the Sixth Amendment. It will afford the defense little comfort, perhaps, when we say, for what it is worth, that we, too, have carefully read the 1,100 pages of the grand jury transcript. We find nothing in those proceedings which, in view of the antitrust character of this case, is prejudicially offensive to the ends of justice. On the basis of that inspection, also, we conclude that the trial court's denial of Beatrice's motion was not an abuse of discretion. The fact we have done so in this case is not to be taken as a precedent for thus burdening any court or as a holding on our part that a review of this kind is necessary or even indicated in all cases.

Compare, generally, on this point, *Fitts* v. *Superior Court*, 1935, 4 Cal. 2d 514, 51 P. 2d 66, 70-71; *United States* v. *Greenberg*, S.D. N.Y., 1962, 204 F. Supp. 400; *United States* v. *Kahaner*, S.D. N.Y., 1962, 204 F. Supp. 921.

3. *The sufficiency of the evidence.* Because of the importance of this issue and the emphasis given it by the defense, we review the evidence in detail. At the trial the government introduced a number of exhibits including compiled charts. This documentary material disclosed the following:

(a) The three years preceding April 1954. The Veterans Hospital opened in early 1951. For ten bid periods all three defendants submitted offers. Alamito received the Hospital contract four times, twice at no discount from the wholesale list price, once at 3%, and once at 10½%; Beatrice obtained the contract four times, once at 1% discount, once at 4½%, and twice at 5%; and Roberts received the contract twice, once at 1% discount and once at 2%. On one occasion Beatrice offered a bid of 7½% discount but was outbid by Alamito. For the eight bid periods at the Air Force Base, Alamito received the contract twice with no discounts, Roberts received it twice at zero and 3.96%, respectively, and Beatrice received it four times, twice at 2%, once at 3½%, and once at 5%.

(b) April 1954 to early 1957. During this period all contracts for both the Hospital and the Base were awarded at a flat 2% discount, with one exception at the Hospital when an alternate of 1½% discount for six months, rather than 2% for twelve months, was accepted. Each of the defendants won contracts at this level. Roberts was always the successful bidder at the Hospital during eight consecutive bid periods, with Alamito and Beatrice either not bidding or bidding at zero or 1% discount. At the Base Alamito and Beatrice were alternately successful at 2%; Roberts consistently submitted a bid at no discount; Beatrice and Alamito, when losing the Base contract, did so on bids ranging from zero to 1½%.

(c) The period after early 1957. At the Hospital Alamito obtained the business at 2½% discount for the period beginning July 1, 1957; on July 1, 1958, Beatrice gained it at 5%; on October 1, 1958, Roberts acquired it at 10%. At the Base, for the six month period beginning June 1, 1957, Roberts obtained the contract for milk in gallons at about 8% discount; for the six month period beginning Decem-

ber 1, 1957, Beatrice gained the gallon contract at about 4%; and for the next succeeding period both Beatrice and Alamito submitted gallon bids at about 5% discount.

The government's case also included the following: (a) Evidence as to the bids submitted by the three defendants and others to the University of Nebraska Hospital and to the Creighton Memorial St. Joseph's Hospital, both in Omaha, during the period of the alleged conspiracy. This showed variations in bidding by the three defendants and offers of discounts from zero up to 15%. (b) Testimony of Lewis Klesath, former manager of Beatrice's Council Bluffs plant, to the effect that in 1956, during the indictment period, he received calls from officials of Roberts and Alamito a week or so in advance of contemplated changes in wholesale list prices in the area and that he discussed those price changes and their effective dates with them. Area prices, of course, were the base points from which bid discounts were measured.

It is axiomatic by now that on an appeal from a conviction it is not for us to weigh the evidence "but only to consider whether the evidence in its most favorable aspect to the Government is legally capable of allowing a jury to become persuaded of guilt." *Phelps* v. *United States*, 8 Cir., 1947, 160 F. 2d 858, 868, cert. den. sub. nom. *Peters* v. *United States*, 334 U.S. 860; *Glasser* v. *United States*, supra, 315 U.S. 60, 80; *Blauner* v. *United States*, 8 Cir., 1961, 293 F. 2d 723, 725, cert. den. 368 U.S. 931; *Isaacs* v. *United States*, 8 Cir., 1962, 301 F. 2d 706, 727, cert. den. 371 U.S. 818. Participation in a criminal conspiracy may be shown by circumstantial evidence as well as by direct evidence. *Delli Paoli* v. *United States*, 1957, 352 U.S. 232, 236, footnote 4; *Blumenthal* v. *United States*, 1947, 332 U.S. 539, 557; *Direct Sales Co.* v. *United States*, 1943, 319 U.S. 703. Of course, declarations of a conspirator are ad-

missible over the objections of an alleged co-conspirator who was not present when they were made, only if there is proof aliunde that he is connected with the conspiracy. *Glasser* v. *United States*, supra, p. 74 of 315 U.S.; *Tingle* v. *United States*, 8 Cir., 1930, 38 F. 2d 573, 575.

The government emphasizes and argues (a) that during the three years preceding the indictment period each of the three defendants had some share of the fluid milk business at both the Base and the Hospital; (b) that vigorous competition had been present during that period with resulting bids varying from zero up to 10% discount and with the last accepted bids at both the Base and the Hospital at 5% and both possessed by Beatrice; (c) that about March 1954 a dramatic and complete change in the bid pattern took place, and genuine competition came to an end; (d) that at the Hospital Beatrice did not renew its immediately preceding successful 5% bid and, with one exception, never offered any discount there; (e) that Alamito offered no discount to the Hospital although, before, it had submitted discount offers up to 10½%; (f) that Roberts received the Hospital business exclusively for the three and one-quarter year period at a uniform 2% discount; (g) that this was in contrast with Roberts' intermittent success in the preceding three years; (h) that Alamito, being a "small business," could have obtained any contract with only an equal bid but did not submit such a bid; (i) that at the Base Roberts did not reoffer its previously successful 3.96% bid and offered no discount at all; (j) that Beatrice did not repeat its last successful 5% bid there; (k) that Alamito and Beatrice got the Base business at a uniform 2% discount; (l) that it came to them in almost perfect rotation; (m) that the 2% discount at the Base was the first ever offered there by Alamito; (n) that after the indictment period there was a sudden reversion to the original competitive practices as illus-

trated by Roberts' submitting bids at the Base ranging from zero to 8%, by Beatrice's getting the gallon contract there for one period at 4%, by 5% bids being offered by both Alamito and Beatrice for the succeeding period, and by successful bids by Alamito, Beatrice and Roberts, respectively at 2½%, 5%, and 10%, all in contrast to the uniform 2% prevailing theretofore; and (c) that this documentary proof is buttressed by the Klesath testimony and by the differing practices at the two Omaha community hospitals.

The government further argues that for the last bid period before the indictment period the Base volume was about twice that of the Hospital; that, with Beatrice and Alamito sharing the Base equally and with Roberts having the Hospital exclusively, the total business was thus divided equally three ways; that the bid pattern at the Base and the Hospital at a uniform winning figure of 2% was obviously unnatural as shown by the contrasting pattern at the University and Creighton hospitals in which the defendants participated; that the record contained no evidence of a "moral call of community charities for favorable prices," as Beatrice would typify it, with respect to the two latter hospitals which would account for the bid pattern differences; that there was widely disparate bidding at the Base and at the Hospital, both before and after the indictment period; and that it follows that there was concerted action to fix prices at the two government institutions during the period in question and to allocate the business there among the three dairies.

Beatrice argues (a) that there is direct evidence against the existence of any conspiracy; (b) that there was no Alamito witness adverse to Beatrice but only one who said he did not know what the other dairies were going to do; (c) that there was no Roberts witness adverse to

Beatrice for the Roberts witness testified that her company determined its bids without consultation with Beatrice; (d) that the Alamito and Roberts witnesses denied the existence of the conspiracy and, inasmuch as they were called by the prosecution, the government is bound by their testimony; (e) that the Hospital purchasing department witness admitted that, so far as he knew, Beatrice had to do only with its own bids; (f) that the only direct evidence against Beatrice was inadmissible hearsay; (g) that Roberts' refusal to offer a discount at the Base from March 1954 on arose out of its dispute with the Air Force over the latter's taking unwarranted discounts for late cash payments; (h) that Roberts did continue to bid discounts at the Hospital; (i) that Roberts never had bid more than 2%, the 3.96% for one period at the Base being 2% plus a 2% cash prompt payment discount thereon; (j) that it was the uniformity of price which the defendants had to pay for raw milk, as required by a federal milk marketing order, which laid the foundation for identical wholesale prices in the area; (k) that the 2% discount figure was not new in 1954 but had appeared in 1952 and 1953 and captured the business; (l) that bids were publicly opened and each bidder therefore knew what the others had offered at preceding bid periods; (m) that Alamito, in contrast to Roberts and Beatrice, needed only to meet the bids of the others in order to get the business; (n) that the total dollar volume of the Base and the Hospital from January 1954 to April 1957 was not divided equally among the three defendants but went 37.7% to Beatrice, 19.8% to Roberts, 40.1% to Alamito and 2.4% to another dairy;[4] (o) that evidence of the

4. The government replies that these figures find no support in the record and that any percentage for the non-defendant dairy is attributable to cottage cheese, a commodity not specified in the indictment and not included in the compilation of the government's opposing figures.

bidding transactions with the University and Creighton hospitals has no significance because it was not demonstrated that they presented comparable situations as to cost elements and the like, because there was advertising value in being the official dairy at a well-patronized general hospital, and because there was a duty to provide favorable prices to community charities; (p) that there was no proof that the bids at the Base and the Hospital were not independently prepared or were not the product of independent judgments of different businessmen; (q) that the bids reflected good business judgments independently arrived at; (r) that the Klesath testimony was immaterial and, in any event, established nothing more than exchanges of information about the Omaha market generally; (s) that the government concedes the absence of a conspiracy before 1954 and yet there are instances of identical bids by all three defendants during that earlier time; (t) that the post-conspiracy period reflects similar instances and yet the government concedes no conspiracy then existed; (u) that the trial degenerated into a mass of extraneous evidence; (v) that the facts are as consistent with innocence as with guilt; and (w) that the government totally failed to prove the crime charged.

In passing upon this issue of the sufficiency of the evidence, we have in mind that the conspiracy charged here actually is very confined. It concerns only fluid milk. It concerns only the Veterans Hospital and the Offutt Air Force Base. And it concerns only the period from 1954 to April 1957. Other outlets in the area and other products are not embraced in the charge.

We recognize, too, that fluid milk is a highly standardized commodity which provides little room, if any exists at all, for quality differences or for special or advantageous purchases of the raw product from suppliers and which,

because of uniform labor contracts, encounters processing costs of rigid consistency. This court noted these very factors in *Pevely Dairy Co. v. United States*, 8 Cir., 1949, 178 F. 2d 363, 367-69, cert. den. 339 U. S. 942, and observed there that

> 'We are clear that mere uniformity of prices in the sale of a standardized commodity such as milk is not in itself evidence of a violation of the Sherman Anti-Trust Act".

These stubborn facts of the milk business, by their very existence, present difficulties in the prosecution of an anti-trust case against commercial dairies. But of course they do not constitute an insuperable obstacle to the successful prosecution of such a case.

After carefully reviewing all the evidence and the entire transcript here we have concluded that, although some might regard the case as not a strong one, Beatrice was nevertheless not entitled to a judgment of acquittal. Beatrice chose to stand on its motion for that judgment and offered nothing in opposition or in explanation of the evidence presented by the government. We cannot say that that evidence, wholly apart from the Vavra and Anderson testimony which is mentioned below, was not sufficient to sustain the jury's verdict or that it was so affirmatively adverse as to necessitate an acquittal. The bid patterns at the Base and Hospital for the pre-conspiracy and post-conspiracy periods contrast vividly with that prevailing during the indictment period. The disparity in the bids at each institution before and after; the 2% uniformity of the successful bids at both institutions during the period; the indicated approximately equal division of the aggregate business among the three defendants; the almost even rotation, timewise, of the Base business between Beatrice and Alamito; the absence of tie bids by Alamito; the contrast with the simultaneously existing bid patterns at

Creighton and the University, and the Klesath testimony manifestly present, upon the standards enunciated by the authorities cited above, an adequate basis for valid inferences of the collusion statutorily forbidden. Of course, there are arguments which can be made to the contrary. But we are persuaded that those arguments are properly for the jury and do not compel the acquittal which Beatrice demands here as a matter of law. That those arguments did not convince the jury is not anything with which we may presently deal, even though, had the case been tried to us in the first instance, it might have been possible for us to decide the issue otherwise.

The defense strenuously urges that there is an utter absence of any direct and independent evidence of collaboration between the alleged conspirators. It is true that Alamito's wholesale manager testified that he did not know what anyone else's bid figures were going to be, that Roberts' treasurer testified that her company did not obtain the approval of Beatrice before they put into effect their price bulletins designed for intra-plant use, and that representatives of the Base and Hospital each testified that so far as he knew Beatrice had nothing to do with the preparation of any bid except its own. But this overlooks, we feel, the bid pattern at the Base and the Hospital and also the Klesath testimony. Although the Klesath conversations had to do with matters affecting the area generally and were not directed specifically to business at the Base and the Hospital, the pricing at the latter was dependent on the former. All this, it seems to us, is basic evidence from which the inferences which the jury necessarily drew could properly follow.

Beatrice, however, cites as controlling authority *United States* v. *Borden Co.*, N. D. Ill., 1953, 111 F. Supp. 562, reversed as to the Clayton Act issue but affirmed as to the

Sherman Act issue, 347 U. S. 514; and *Pevely Dairy Co.* v. *United States*, supra, 8 Cir., 1949, 178 F. 2d 363.

Borden was a civil suit brought by the United States. Ten defendant dairies were charged with conspiracy to restrain and monopolize interstate commerce in the sale of fluid milk to wholesale customers in the Chicago area, in violation of the Sherman Act, and with price discrimination, in violation of the Clayton Act. Injunctive and other relief was sought. Five defendants negotiated a consent decree. At the conclusion of the government's case the five remaining defendants each moved to dismiss. The court initially observed that conspiracies of the kind described in the complaint "are difficult to prove, and most often can be proved only through the use of evidence which is circumstantial and seemingly remote"; that the testimony of solicitors of the defendants and of wholesale customers served by the defendants revealed "glaring inconsistencies" and cumulatively failed "to reveal any consistent pattern of business conduct among the defendants"; and that the testimony did reveal a "continuous shuffling of customers" which was "not consonant with the existence of a monopolized market". The court reviewed other oral and documentary evidence and indicated that it was "more impressed with what the documents fail to show rather than that which the documents show". The government introduced exhibits which were tabulations of bids made by the dairies for institutional customers. These showed that particular defendants repeatedly submitted low bids to particular institutions and that certain defendants were alternately successful in bidding for the business of certain institutions. The court refused to draw from these charts the inferences of collusion for which the government argued but concluded instead that the exhibits showed no more than "a disposition on the part of certain defendants to bid for the milk requirements of particular

public institutions". It went on to observe that there was no direct evidence of an agreement or understanding among the defendants or of intercorporate communication; that reasonable businessmen will act similarly when facing a like problem; that every major dairy in the area had been presented with the same problem, namely, the advent of a new competitor, and that similar action directed toward this problem did not enable the court to infer a concert of action. It held that the government must present independent evidence to prove that the defendants were participants in a plan. The dismissal of that part of the complaint which charged Sherman Act violations was therefore granted. As we have noted above, this phase of the trial court's decision was affirmed by the Supreme Court, pp. 516-17 of 347 U. S. The remainder of the case continues in litigation. See *United States* v. *Borden Co.*, 1962, 370 U. S. 460.

In *Peevely* the two defendant dairies were convicted by a jury of a conspiracy to fix wholesale and retail prices on milk in the St. Louis area in violation of the Sherman Act. Six individual defendants who were officers or employees of the corporate defendants were acquitted. One of the issues raised by the defense was that the evidence was insufficient to sustain the conviction. This court, in ruling on the issue, observed that the evidence was wholly circumstantial and undisputed. It noted that raw milk prices were fixed by government regulation; that milk quality was prescribed by local ordinance; that labor costs were substantially the same for each defendant; that the processed product the defendants handled was a standardized product; that the circumstantial evidence consisted of the uniformity of prices charged and the proximity in time of price changes; that proved conversations between employees of the defendants concerning price announcements occurred only some seven years before the filing of

the indictment; that prices were thoroughly analyzed by management upon the basis of economic factors; that the evidence showed that those factors were the only considerations influencing the price changes; that the pricing system was in accord with one established by an international association; that economic principles must be recognized by the courts; that mere uniformity of prices in the sale of a standardized commodity such as milk is not in itself evidence of a violation of the Sherman Act; that the price changes were not simultaneous and were not uniformly initiated by the same defendant; that the same economic factors applied to each defendant; that the evidence was undisputed that officials of the defendant dairies made no agreement with respect to the fixing of prices; that the acquittal of the individual officials weakened the presumption of correctness usually attributable to the verdict of a jury; that the circumstances were not inconsistent with innocence; and that the motions of the defendants for acquittal should have been sustained. Judge Thomas dissented on this issue.

Borden and *Perely* do lend some support and argumentative material to the position of Beatrice here. We feel, however, that neither compels a conclusion that the evidence in the present case was insufficient to support a jury verdict. In so holding we do not in any way impinge upon the authority of either *Perely* or *Borden*. Both cases were concerned with conspiracies alleged to exist with respect to broad metropolitan areas. Here only two institutions are involved. *Borden* presented instances of what the court chose to describe as "glaring inconsistencies in the testimony"; there was an absence of evidence of a pattern of business conduct; and there was continuous shuffling of customers. In *Perely* the government's evidence was wholly circumstantial; there was evidence of absence of agreement; no inter-corporate conversation with-

in seven years was shown; and there was proof that prices were determined by each dairy acting independently upon its own analysis of economic factors. In both *Borden* and *Pevely* testimony was presented by the defense which served to destroy the inferences the government urged. In the case before us Beatrice has made no record, there is at least some direct evidence supporting the circumstantial, and there were bid patterns of definite outline. The prosecution's case rises above those presented in *Borden* and *Pevely*.

In cases of this kind direct testimony of unlawful agreement is usually not available and the prosecution is compelled to rely on inferences drawn from the course of conduct of the alleged conspirators. Here, as we have noted, there is some supporting testimony of direct character. In any event, we regard as pertinent the following language of the Supreme Court in *Interstate Circuit, Inc.* v. *United States* 1939, 306 U. S. 208, 225-26:

> "Taken together, the circumstances of the case which we have mentioned, when uncontradicted and with no more explanation than the record affords, justify the inference that the distributors acted in concert and in common agreement * * *. When the proof supported, as we think it did, the inference of such concert, the burden rested on appellants of going forward with the evidence to explain away or contradict it."

That Court has also said, with respect to criminal cases, "Once the Government has established its case, the defendant remains quiet at his peril". *Holland* v. *United States*, 1954, 348 U. S. 121, 138-39.

4. *Errors in the reception of evidence.* This is directed to the trial court's admission into evidence of the bids of Roberts and Alamito and of the testimony of government witnesses Vavra and Anderson.

The bid evidence is attacked on the ground that a conspiracy cannot be proved by declarations of alleged coconspirators made outside the presence of the defendant. We feel, however, that Beatrice's own bids are facts which are pertinent to the issue here. It is true that the bids of Alamito and Roberts were necessary to show their participation in the alleged conspiracy; when viewed alone, however, those bids could not implicate Beatrice. It is the bidding pattern of all three which evidences the conspiracy and the bids of all three constituted conduct rather than declarations.

Vavra was a driver formerly employed by Alamito. He testified that in May 1955 he started working parttime for that dairy; that he ran its route to the Base; that in November of that year he talked with McCarty, the Alamito plant manager; that he asked McCarty what he was to do when the route was over and if he would still be employed; that McCarty said, "* * * no, but that I would probably be back in six months; that Alamito would have the route out there again"; that McCarty told him he "would probably be working every six months * * * it was the policy of the two companies, Meadow Gold [Beatrice] and Alamito, that one would have it for six months and then the other one"; that he was reemployed when Alamito received the contract again in June 1956; and that McCarty had died by the time of the trial.

Beatrice's objection to the Vavra testimony is that it was inadmissible in the absence of independent proof of the claimed conspiracy. Because we feel that independent proof of the conspiracy was present, we necessarily conclude that the district court did not err in admitting this testimony.

Major Anderson was procurement officer at the Base from 1955 to 1958. He testified that he had a conversation in his office with his clerk, Phyllis Orth, on May 8,

1956, when bids were to be opened; that Mrs. Orth said, "I wonder whose turn it is today"; that in response to his inquiry she further said, "Well, those bids are rotated among the firms"; and that she said that she based that comment on "past observations of bid openings in this office". The district court, on its own motion, struck that testimony and directed the jury to disregard it because it was self-serving and not binding on Beatrice.

The Major then testified that he was present at the opening of bids on that day; that he observed the bids were identical on most fluid milk items; that he announced that they were identical; that it was stated by those present that the discounts would vary at different times; that he then said,

> "Do you mean to tell me that your costs of the various firms are identical on all or a majority of these items down to a fraction of a cent even though some of you may have efficient personnel and equipment and some of you may have less efficient personnel and equipment?";

and that they replied in the affirmative. In response to an immediate inquiry by the court, Anderson conceded that he had no way of disputing this because he had never been in the milk business.

Beatrice objected to the Anderson testimony on the ground that it was hearsay and not binding on Beatrice. It argues that the witness would not have been permitted to testify directly that the uniform bids were the result of an illegal price-fixing conspiracy and that he should not be allowed to do the same thing indirectly.

Clearly the Orth-Anderson conversation can be of no significance on this appeal. With the proof aliunde in this record we must accept the premise that the jury obeyed the court's instructions to disregard this testimony. We view the situation as one where the instruction has cured

the error and not as one of the kind where its withdrawal cannot remove a harmful effect it caused. Compare *Dolan* v. *United States*, 8 Cir., 1955, 218 F. 2d 454, 460, cert. den. 349 U. S. 923; *Wiley* v. *United States*, 8 Cir., 1958, 257 F. 2d 900, 905-6; *Kotteakos* v. *United States*, 1946, 328 U. S. 750, 764-65; *Deli Paoli* v. *United States*, supra, p. 242 of 352 U. S.

Although we have doubt as to the admissibility of the other Anderson testimony, we are not convinced that, if its admission was error, there was resulting prejudice. Anderson's comment was one which a jury would regard as a natural reaction for a procurement officer and we agree that whatever seeming significance it might initially have had was dulled and dissipated by the trial court's own rebuke and limiting question. On this record we hold its admission to have been harmless error within the standard of Rule 52(a), F. R. Cr. P.

5. *Errors in the instructions.* Beatrice's points here are (a) that the trial court by its instructions in effect amended the indictment by several times describing the charge against the defendants as one to fix uniform prices in the general Omaha area and (b) that the court's thrice-repeated emphasis to the jury that it should consider the evidence as a whole was prejudicially misleading and confusing. Appropriate exceptions were made.

We have read the instructions in their entirety and with great care. It is seldom that counsel in a complicated criminal case can be satisfied with every phrase of the court's charge to the jury. It is seldom, too, that an appellate court or, for that matter, a trial court reviewing his own instructions already delivered cannot find ways in which those instructions could have been improved.

It would serve little purpose for us to set forth in this already lengthy opinion the details of the charge which

the defense attacks here. It will suffice to say that the trial court did make references to the "Omaha area" and did speak of conspiring to maintain uniform and non-competitive prices on dairy products in that area. We feel, however, that the charge is neither fatally defective nor unfair. It seems clear to us (and, as to this, we have considered the government's closing arguments and the fact of the jury's request, not acted upon by the court because the verdict was returned in the interim, for a copy of the text of the Sherman Act) that the jury did not assume or understand that Beatrice was charged with anything other than a conspiracy directed solely to the Base and the Hospital or, to express it reversely, that it undertood Beatrice was not charged with a conspiracy to fix uniform prices generally in the Omaha market. We are persuaded as to this by the court's and counsels' repeated emphasis upon the Base and the Hospital as the objects of the conspiracy. Also, the indictment was read to the jury and was specific in its confining aspects. The evidence itself was overwhelmingly directed to the two institutions. Area reference was not improper in itself for the bids, in terms of discounts from wholesale list prices, were of significance only in relation to the prices prevailing in the Omaha market. It is often the case that a court might properly have given instructions requested by the defense but we cannot say that the instructions here did not adequately present the issues in a form understandable to the jury. The situation is far different from those involved in *Stirone* v. *United States*, 1960, 361 U.S. 212, and *Bollenbach* v. *United States*, 1946, 326 U.S. 607, and other cases suggested by the defense.

Beatrice's argument as to undue emphasis upon the evidence as a whole also fails to persuade us. It is true that the jury was told three separate times during the course of the instructions to consider the evidence as a whole.

But it was also told, and at least three separate times, that the conspiracy had to be established by evidence independent of the declarations of co-conspirators. Here, too, we are not willing to assume on this record that the jury did not heed the cautionary portion of this charge or was prejudicially confused. "Our theory of trial relies upon the ability of a jury to follow instructions". *Opper* v. *United States*, 1954, 348 U.S. 84, 95.

Affirmed.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

APPENDIX B.

CHARGE TO JURY.

By The Court: Ladies and gentlemen of the Jury:

Now that the evidence has been presented to you and the arguments of counsel have been made, it becomes my duty to inform you of the legal principles and considerations by which you are to be guided in arriving at your verdict.

Under your oaths of office you are bound by the law as the Court shall declare it to you. As these instructions embody the law governing this case, it is imperative that you give close and careful attention to them.

At the outset, I may properly urge you to make a forthright effort to accomplish an agreement in your deliberations. Inconclusive trials are highly undesirable. A common understanding among competent and intelligent persons ought to be possible.

However, this observation must not be construed by any juror as a suggestion of the abandonment, for the sake of agreement alone, of an opinion held understandingly and earnestly by him or her. The Court must never coerce agreements by jurors. But it is appropriate to suggest that if, during your deliberations you should find yourselves in apparent disagreement, each of you ought carefully to examine the ground of his or her opinion before assuming a final position of dissent.

An indictment, ladies and gentlemen, is a formal charge in writing against a defendant, or defendants. An indictment is the result of an investigation by the Grand Jury

and the officers of the law. This investigation is in no sense to be taken as a trial, but it simply constitutes the regular method of bringing the matter before the Court and Jury for a trial.

The indictment itself is not evidence of the guilt of a defendant nor does it detract in any degree from the presumption of its innocence with which the law surrounds it until its guilt is proved beyond a reasonable doubt, and in this instance, when I say "it" I refer to the defendant Beatrice Foods Company. This charge contained in the indictment the Government must establish by proof beyond a reasonable doubt in order to show the defendant guilty of the crime with which it stands charged.

Corporations are entitled to the same fair and impartial consideration at your hands as are natural persons and a corporation has the same interest and right that a natural person has in defending its name and reputation against imputations of crime.

You enter upon this investigation, ladies and gentlemen, with a presumption that Beatrice Foods Company is not guilty of any crime, and this presumption stands as a witness for it until it is rebutted and overturned by the Government by competent and credible proof. It is, therefore, incumbent upon the Government, before you can convict the defendant, to establish to your satisfaction beyond a reasonable doubt that the crime charged in the indictment, and every constituent element thereof, has been committed, that the same was committed within the Judicial District of the State of Nebraska, and that Beatrice Foods Company committed the crime in such a manner as would make it guilty under the law heretofore defined and explained to you.

By reasonable doubt is not meant any possible or captious doubt that may arise in your minds, but it is that

doubt engendered after the application of the reasoning of logical processes to the evidence in the case, and an inability after such to let the mind rest easily upon the certainty of guilt. Absolute certainty of guilt is not demanded by the law to convict on any criminal charge, but moral certainty is required, and this certainty is required as to every proposition of proof requisite to constitute the offense charged.

You are instructed that the fact that the defendant has not produced evidence in its behalf should not be considered or construed in any way against it, and you are not at liberty to indulge in any presumption of guilt or any unfavorable presumption or inference because it has not produced evidence in its own behalf.

Under our law a defendant is entitled to take the stand or not as he, she, or it chooses, and under our Constitution no one is compelled to be a witness against themselves. No presumption whatsoever is to be indulged against a defendant because it does not take the stand, and it does not change the fact that the burden of proof is upon the government to prove the defendant guilty beyond a reasonable doubt.

On August 28, 1958, a Grand Jury for this District returned an indictment in one count against the defendant Beatrice Foods Company. As I have instructed you before, while Roberts Dairy Company and Alamito Dairy Company are included in this indictment, they are not on trial at this time.

The indictment, so far as material for your purposes, reads as follows:

> "The Grand Jury charges: Beginning in or about January of 1954, the exact date being to the grand jurors unknown, and continuing thereafter up to about April, 1957, the defendant and others to the grand

jurors unknown have "engaged in a combination and conspiracy to eliminate and suppress competition in the sale of milk and cream to the Offutt Air Force Base and the Veterans Hospital in unreasonable restraint of the aforesaid trade and commerce in violation of Section 1 of the Act of Congress of July 2, 1890, 26 Stat. 209, as amended (15 U. S. C. 1) entitled 'An Act to protect trade and commerce against unlawful restraints and monopolies,' commonly known as the Sherman Act. The aforesaid combination and conspiracy has consisted of a continuing agreement, understanding and concert of action among the defendants, the substantial terms of which were:

(a) To fix and establish non-competitive prices and discounts for milk and cream sold and distributed to the Offutt Air Force Base;

(b) To fix and establish non-competitive prices and discounts for milk and cream sold and distributed by the defendants to the Veterans Hospital;

(c) To allocate to the defendant Roberts, the bid contract business of supplying milk and cream to the Veterans Hospital;

(d) To alternately allocate to the defendants Alamito and Beatrice the bid contract business of supplying milk and cream to the Offutt Air Force Base."

Members of the jury, the purpose of the antitrust laws, it should probably be briefly explained in the outset, is to preserve the free flow of commerce among the several states and to keep its channels open, free and unobstructed to all. Their further purpose is to secure to everyone an equal right and opportunity to engage in the trade and commerce of the country. **They provide, among other things, against conspiracies in restraint of free competition in business and commerce which tend to restrict production,**

fix, raise, stabilize or control prices, or to maintain uniform and non-competitive prices **or otherwise control the market to the detriment of purchasers** or consumers of goods or services, all of which is considered as being injurious to the public welfare.

I shall now explain to you the law as applicable to the charges in this indictment.

The pertinent section of the Sherman Act upon which the indictment in this case is based reads as follows:

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, is declared to be illegal. Every person who shall make any contract or engage on any combination or conspiracy condemned by this law shall be deemed guilty of a misdemeanor and, on conviction thereof, shall be punished."

Conspiracy, for your information, is a combination of two or more persons by concerted action to accomplish a criminal, or unlawful purpose, or some purpose not in itself criminal by unlawful means. Formal agreement between the parties concerned is not essential to the formation of a conspiracy, but it is sufficient if it is a concert of action of all the parties working together understandingly with a single design for the accomplishment of a common purpose, or purposes. If the evidence of the separate details of the transaction or transactions as it or they are carried out indicates with requisite certainty the existence of a preconcerted plan or purpose, that is sufficient.

The conspiracy is complete whether the offense which the parties have agreed, or conspired, to commit, **such as price fixing or price maintenance,** is committed or not. A person may be guilty of a conspiracy if he takes any part in same knowingly, as set out, and the burden rests upon

the Government to prove guilty knowledge of the accused beyond a reasonable doubt.

A person joining a combination or coming into a conspiracy after it is formed and in some way assisting in its execution is a party thereto and is liable therefor to the same extent as if he had been an original party and a member from the inception of the same.

It is not necessary, the Court should advise you, that one conspirator know of each separate and minute act on the part of another conspirator or have knowledge of all of the operations of a conspiracy.

The gist of a conspiracy, ladies and gentlemen, is that two or more persons shall form a plan for concerted action. You must, under the rules, as the Court has stated, **find at least two of the alleged conspirators herein did this before you would be justified in convicting the defendant.**

The concerted action or cooperation referred to may arise from definite, express and well-understood agreement or combination, or it may arise as well from a tacit silent understanding. The understanding, combination or agreement between the parties in a given case to effect the unlawful purpose charged must be proved beyond a reasonable doubt, because without corrupt understanding there is no conspiracy.

The defendant on trial in this case, you understand, is a corporation. A corporation acts through its agents, including its employees and officers. Therefore, **in determining whether the corporate defendant in this case has violated the antitrust laws,** it is necessary for you to determine that the corporation has performed the acts charged in the indictment by virtue of and through the acts of its agents, meaning its officers and employees.

In order for a corporation to be responsible for the acts or statements of an agent, it is not necessary that the

corporation specifically authorize the agent to commit the act or make the statement. A corporation is legally bound by the acts and statements of its agents done or made within the scope of their express or apparent authority. Express authority is that specifically given to an agent by his superior; apparent authority is the authority which outsiders would normally assume that the agent would have, judging from his position with the company and the circumstances surrounding his past conduct. When the act of the agent is within the scope of his apparent authority, the corporation is held legally responsible for it, although it may be contrary to his actual instructions and although it may be unlawful.

Ladies and gentlemen of the jury, the Court has instructed you that any act done by a party to a conspiracy in furtherance of a common design and pending the illegal enterprise, is, in law, the act of all, and proof thereof is evidence against all who participate. Likewise, the Court has instructed you that declarations by one alleged conspirator in the same circumstances are competent in evidence against all. In this connection, however, the Court instructs you, and you should keep this in mind in your consideration of this case, that acts and declarations of an alleged conspirator performed or made in the absence of other conspirators, while competent against all who are connected with the conspiracy which has been formed and which is in existence, such acts and declarations may be considered by you only if a conspiracy has been found by you to have been formed and the alleged conspirators are identified with same. In other words, before you are warranted in considering such acts or statements made by one alleged conspirator which might implicate other alleged conspirators, it is necessary for the Government to show the **existence of a conspiracy**, and this must be done by independent evidence; that is, other evidence of a substan-

tial nature, you understand, leaving out the acts and declarations of any alleged conspirator, or conspirators, referred to.

The question with you is whether or not Beatrice Foods Company has entered into an agreement to fix and establish prices and discounts on milk or to divide or allocate the bid business of supplying milk to Offutt Air Force Base and the Veterans Hospital. **The Government contends that such an agreement is proven in part by testimony of telephone conversations prior to price changes which were initiated on August 1, 1956, and January 1, 1957.** The facts are for you to decide. Of course, as the Court has stated, an agreement to fix or establish prices need not be formal nor need it be spelled out in any certain language. **It is for you to consider the entire conversations and the setting in which they took place, and to determine from that whether or not Beatrice Foods Company reached a common understanding with Roberts or Alamito, or both, to fix and establish its price. In this connection it is not necessary for the Government to prove that every price change initiated or every bid received by Beatrice Foods Company was preceded by telephone conversations by Beatrice Foods Company with Roberts or Alamito and resulted from a price-fixing agreement among them. A single agreement to fix, maintain or establish prices and discounts constitutes a violation of the law.**

As a first order of business, then, in your consideration of this case, you will first inquire as to whether or not the Government has proven **a conspiracy** existed by separate and independent evidence before you are warranted in considering any actions or declarations made pursuant to same as herein stated by the Court.

In determining the character of a combination, it is to be judged not only by examining its separate parts, but by

looking at it as a whole. It is not essential that each and every act be unlawful for acts done to give effect to the unlawful agreement may be, in themselves, wholly innocent acts. **Yet if they are part of the sum of acts entered into to make effective a price fixing agreement, then the evidence as a whole establishes a violation of the antitrust laws.**

The Court instructs you that it would be a violation of the Sherman Act for a group of individuals or corporations to act together to fix, stabilize or control the prices to be charged for dairy products which they handle, or to maintain uniform prices thereon, that is, you understand, especially where they control a substantial part of the interstate trade and commerce in that commodity. Where the members of a group, or combination, has the power to fix prices or otherwise regulate or control same and knowingly act together for that purpose, the combination is illegal and it is immaterial how reasonable or unreasonable the prices agreed on are, or to what extent they are or may be effected by the combination. If such illegal combination exists, it does not matter that there might have been other factors which contribute to the raising of prices.

To elaborate, the aim and result of every price fixing agreement, if effective, is the elimination of one form of competition. The power to fix prices, whether reasonably exercised or not, involves power to control the market and to fix arbitrary and unreasonable prices. The reasonable price fixed today may, through economic and business changes become the unreasonable price of tomorrow. Once established, it may be maintained unchanged because of the absence of competition secured by the agreement for a price reasonable when fixed. Agreements which create such potential power are in themselves unreasonable or unlawful restraints, without the necessity of minute inquiry whether a particular price is reasonable or unreason-

able as fixed and without placing on the Government in enforcing the antitrust laws the burden of ascertaining from day to day whether it has become unreasonable through the mere variation of economic conditions.

Under the Sherman Act, ladies and gentlemen, a combination formed for the purpose and with the effect of raising, fixing, stabilizing or controlling or maintaining the price of a commodity in interstate commerce, such as dairy products, is illegal per se, or in and of itself, and a violation of the antitrust laws of the United States.

The Court should probably remind the jury at this point that there is no controverted issue in the trial of this case concerning the interstate character of the operation of the defendants on trial with respect to their products. It is stipulated by the parties, as a matter of fact, that the defendant on trial was at all times materially engaged in interstate commerce with respect to the dairy products here in question.

For your information, fixed prices on merchandise or commodities means agreed prices and an agreement to fix prices or to maintain uniform prices, as I say, is illegal in itself, and this is true regardless of the machinery, mechanism or means employed to arrive at this result; and regardless of any cost factors which might enter into the manufacture and marketing of such commodities, for such cost factors are irrelevant and immaterial where prices are fixed, controlled or maintained by agreement of the parties.

So ladies and gentlemen, whatever justification or motive, whether economic, benevolent, or otherwise, that price-fixing agreements may be said to have, the law does not permit inquiry into their reasonableness. Therefore, **if you determine that the defendants agreed or conspired to fix, stabilize, or control prices, or agreed to maintain uniform**

and non-competitive prices of dairy products in interstate commerce within the Omaha area, you must find them guilty notwithstanding the motives or purposes of the defendant in so agreeing or acting.

The Court has stated to you the purposes of the Sherman Antitrust Act and the restrictions under it, but has not intended to leave the impression that it is unlawful for dairy operators to sell dairy products at the same or uniform prices, nor is it unlawful for one dairy to meet the price of another dairy, whether the price is lower or higher. The mere fact that one or more of the dairies involved here may have promptly met the price of another, or that there was a simultaneous price change, if such is the evidence in your opinion, is not sufficient to warrant you in returning a verdict of guilty. **Before you can convict the defendant on trial in this case you must find from the evidence, beyond a reasonable doubt, that any equality or uniformity of prices at a given time resulted, as the Court has stated, from a combination or conspiracy to fix, control or maintain prices of dairy products in the Omaha area.**

Beatrice Foods Company is charged with having combined and conspired to fix and establish non-competitive prices and discounts for milk sold to Offutt Air Force Base or the Veterans Hospital during the period alleged in the indictment. Beatrice Foods Company is not charged with having combined or conspired to fix and establish identical prices.

You may consider the facts, if you find them to be true, that the prices and discounts charged to Offutt Air Force Base or the Veterans Hospital during the period charged in the indictment were not identical, only insofar as you believe such facts bear upon the question of whether or not the defendant entered into a combination or conspiracy to

fix and establish such prices and discounts. If, after a consideration of all the evidence, you find that the defendant did engage in a combination or conspiracy to fix and establish said prices and discounts, as charged in the indictment, the fact that the prices and discounts were not identical would not constitute a defense.

It is not the law, members of the jury, that one cannot sell his products at any price which is agreeable to him. He may fix his own price at any level he desires so long as he does not enter into an agreement or conspiracy with others to fix, control or maintain the price of his products which move in interstate commerce.

The Court instructs you, of course, that if you believe the evidence in this case shows a situation or situations with respect to prices brought about by conditions, or factors, other than by agreement or agreements between the defendant and others which established non-competitive prices and discounts of dairy products from time to time at Offutt Air Force Base, and the Veterans Hospital, it would be your duty to find in favor of the defendant, **since the main charge, as you have been advised, for which the defendant is on trial is that of agreeing or conspiring to fix, control or maintain the prices of dairy products.**

Under the Sherman Act, which is the legal basis for this indictment, as you understand, it is not unlawful for competitors to discuss labor problems, or the economic conditions of the companies, or the effect labor contracts may have upon prices, or the prices themselves, so long as there is no combination, conspiracy or agreement between the competitors by which they agree upon, fix or stabilize their prices.

The mere fact that the Government was the customer or prospective customer in the transactions under examination is immaterial. The Government has no special rights

as a customer under the antitrust laws and business firms have the same liberty to decide whether they wish to sell their products to the Government agencies, on what terms and prices, as they have with respect to selling to private firms or institutions.

The existence and nature of a conspiracy or agreement to restrain trade in violation of the Sherman Antitrust Act is to be determined upon a consideration of the evidence as a whole. It is not essential that each and every act be unlawful, and you may find that many of the acts and statements shown by the evidence are wholly innocent when viewed individually.

If you should find from all of the evidence beyond a reasonable doubt that **a conspiracy** existed, you must nevertheless determine, as to the defendant Beatrice Foods individually and separately whether or not it joined such conspiracy. In other words, the membership of the defendant Beatrice Foods Company must be determined from the evidence concerning its own actions.

If, and when it appears from the evidence presented here **that conspiracy** existed, then the acts and statements of any of the corporations involved herein found to be a member of the conspiracy may be considered by the jury as evidence in the case as to all of the corporations, including this defendant, found to have been members of the conspiracy, even though the acts and statements may have occurred in the absence and without the knowledge of the other members; provided such acts and statements were knowingly done and made during the continuance of such conspiracy and in furtherance of an object or purpose of the conspiracy.

Otherwise, any admission or incriminatory statement made by one person may not be considered as evidence against any person who was not present and heard the statement made.

Ordinarily, evidence of acts and declarations of an agent of a corporation are admissible only as against that corporation. However, **if you find that some or all of the corporations here, including the defendant, acting through their agents entered into an agreement or understanding concerning dairy prices, then evidence of acts or declarations of an agent of one corporation who had agreed will be binding upon all others who were parties to the same agreement.** This is true, whether or not the other corporations, who you may have found to have agreed, had any knowledge of the commission of the act or the making of the declarations.

For this reason, it is not necessary to show that all corporations who you may have found to have agreed participated in every act, so long as one of the group did so act in furtherance of the unlawful agreement.

You are instructed that in order to justify a jury in finding a verdict of guilty based entirely upon circumstantial evidence, the facts must not only be consistent with the guilt of the defendant, but they must be inconsistent with any other reasonable hypothesis that can be predicated upon the evidence. Stated another way, not only must each fact relied upon to show guilt be proved beyond a reasonable doubt, but such fact must be consistent with all other facts introduced in a chain of circumstances, and such facts must further be inconsistent with any other rational conclusion than that of guilt of the defendant.

As I have said, the guilt of the defendant may be shown by circumstantial evidence alone and whether the guilt of the defendant has been so established is for you to determine. Where circumstantial evidence is relied upon to establish the conspiracy or any other essential facts, it is not only necessary that all the circumstances concur to show the existence of such conspiracy and facts sought to be

proved, but such circumstantial evidence must be inconsistent with any other rational conclusion.

The credibility of the witnesses and the weight of their testimony are questions exclusively for you to determine. In determining the weight to be given to the testimony of the several witnesses you should take into consideration their interest in the result of the suit, if any such is proved; their conduct and demeanor while testifying; their apparent fairness or bias if any such appears, and opportunities for seeing and knowing the things about which they testify; the reasonableness or unreasonableness of the story told by them, and all the evidence and facts and circumstances proved tending to corroborate or contradict such witnesses, if any such appear.

If you find that any witness in this case has wilfully testified falsely as to any material fact in the case, then you are at liberty wholly to disregard all of the testimony of that witness, if you consider it to be wholly unworthy of credence. However, you are not obliged so to disregard all of the testimony of such witness and should not do so if in your opinion any part or parts of such testimony are worthy of belief.

In this case, the only witnesses you have heard have been witnesses tendered by the Government. In bringing these witnesses before you, the Government vouches for them and cannot, unless the witnesses have contradicted each other, disavow any substantial part of their evidence regardless of whether it was given while the witness was on direct examination by Government counsel or was given while the witness was on cross-examination by defense counsel.

The Court instructs the jury that the number of witnesses alone testifying for one side or the other should not determine the question of the guilt or innocence of a de-

fendant. Before you can determine the innocence or guilt of a defendant it is your duty to consider all the evidence introduced upon the trial.

There is nothing peculiarly different in the way a jury is to consider the proof in a criminal case from that by which men and women give their attention to any question, depending upon evidence presented to them. You are expected to use your good sense, consider the evidence for the purpose only for which it has been admitted and in the light of your knowledge of the natural tendencies and propensities of human beings resolve the facts according to deliberate and cautious judgment, and while remembering that the defendant is entitled to any reasonable doubt that may remain in your minds, remember as well that if no such doubt of guilt remains, the Government is entitled to a verdict.

It is the right and duty of an attorney, whether representing the Government or a defendant, to protect the interests of his client by objecting to the introduction of, or moving to strike out, evidence he deems improper, as well as to offer evidence he believes competent for admission. You must not be prejudiced against any party to this case because the attorney for such party may have made such objections or motions or offers, regardless of the Court's ruling thereon.

You must disregard entirely any personal sympathy which you may have or feel for the defendant. Likewise, however, you must entirely disregard, and be utterly uninfluenced by, any inclination to which you may be tempted towards a personal prejudice against the defendant arising out of any consideration, and particularly out of the nature and character of the charge made against the defendant. You must try and determine the case solely upon the evidence before you and the instructions contained in the charge now given you by the Court.

The punishment provided by law for the offense charged in the indictment is a matter exclusively within the province of the Court, and it is not to be considered by the jury in arriving at an impartial verdict as to the guilt or innocence of the defendant.

You should carefully and impartially investigate, weigh and consider all the evidence received in this trial. You are to found your verdict upon the evidence received and upon that alone. You are not to presume the existence of any fact unless it has been testified to on the trial. You are not to supplement what has been testified to with any other fact that you may think exists but which has not been proved. In short, you are to determine this case upon the evidence before you and not upon what may or may not exist outside that evidence. You are not to permit yourselves to be influenced by evidence offered and excluded or stricken out, if any there be, nor by any statements of counsel during the progress of the trial, or any arguments that are not justified by the evidence, if any such statements or arguments have been made.

In the trial of this case and in this charge, I have in no wise attempted to express my opinion as to the guilt or innocence of the defendant, and you must not construe any statement, action or ruling by me as the presiding judge in the trial of this cause, nor any of the instructions now given you, nor this charge as a whole, as an indication of any opinion of mine upon the guilt or innocence of the defendant. In this court it is within the province of the judge, in his charge, to comment, or express his opinion, upon the evidence or even upon the guilt or innocence of a defendant who is on trial. I have endeavored not to do that in this instance. I have perceived no exceptional or confusing situation in the evidence, which might reasonably be expected to elude you without my elucidation. Regardless of what

I may have chosen to say, regardless of any comment upon the facts which you may consider I have actually made, I must admonish you that you are the sole judges of the facts; and your verdict must respond to your own recollection of them and your own conclusion touching them from the evidence, and not to any intimation of my recollection or opinion of the evidence, which you may consider that you have discerned in this charge.

Some of the exhibits which have been received in evidence will be made available to you for examination during your study of the case. They must be returned into court when you have completed your deliberations.

When you retire to the jury room, members of the jury, you will first elect one of your members as foreman. It will then be the foreman's duty to preside over your deliberations on your verdict; to act as your chairman; and to represent you as spokesman in the further conduct of this case.

One form of verdict has been prepared and will be taken with you when you retire for your deliberation. This form of verdict will be adequate for the expression of your verdict in this case. Your foreman only will date and sign the form reflecting your verdict. The form of verdict must be returned to the clerk upon the completion of your deliberations.

This being a criminal case, you will not hereafter be allowed to separate until your deliberations have been completed.

If it becomes necessary during your deliberations to communicate with the Court, your foreman may send a note by the Marshal. Never attempt to communicate with the Court by any means other than a signed writing. And bear in mind that you are not to reveal to the Court or to

any person how the jury stands, numerically or otherwise, until you have reached an unanimous verdict.

Your meals and lodging, while you are being kept together will be provided for you under the Marshal's direction, if your deliberations continue during a period of time sufficient to require such provision.

As the Judge presiding over the trial, I shall be available in this building throughout the remainder of the present day and until your verdicts have been returned, and shall receive them promptly upon their return.

Ladies and gentlemen of the Jury, that completes the reading of the Court's charge. Ladies and gentlemen of the Jury, you will now repair to your jury room while counsel for both sides are given an opportunity to take such exceptions as they may want to take to the Court's charge.

DEFENDANTS REQUESTED INSTRUCTION NO 1.

(Much of this instruction was given as tendered or in slightly amended form. However, the paragraph appearing in boldface was denied.)

Instruction No. 1.

The indictment charges that in approximately January, 1954, Beatrice Foods Company, Roberts Dairy Company and Alamito Dairy Company, and others, entered into a combination and conspiracy to eliminate and suppress competition in the sale of milk and cream to Offutt Air Force Base and Veterans Hospital, and that the combination and conspiracy consisted of a continuing agreement, understanding and concert of action among those three companies, the substantial terms of which were:

To fix and establish non-competitive prices and discounts for milk and cream sold and distributed to the Offutt Air Force Base;

To fix and establish non-competitive prices and discounts for milk and cream sold and distributed by the defendants to the Veterans Hospital;

To allocate to the defendant Roberts, the bid contract business of supplying milk and cream to the Veterans Hospital;

To alternately allocate to the defendants Alamito and Beatrice the bid contract business of supplying milk and cream to the Offutt Air Force Base.

The issue in this case is solely whether the Government has proved the defendant guilty of the particular conspiracy defined in the indictment. Evidence, if any, of any other or different conspiracy is immaterial to the issue you are to decide. The price of milk to the housewife in Omaha or to grocery stores or other institutions is not in issue in this case. (Denied.)

APPENDIX C.

Judgment.

UNITED STATES COURT OF APPEALS,

For the Eighth Circuit.

No. 16,899 September Term, 1962

BEATRICE FOODS CO.,

Appellant,

vs.

UNITED STATES OF AMERICA.

APPEAL FROM the United States District Court for the ..... District of Nebraska.

THIS CAUSE came on to be heard on the record from the United States District Court for the ..... District of Nebraska, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court, that the judgment and sentence of the said District Court, in this cause, be, and the same is hereby affirmed.

January 2, 1963.

Order entered in accordance with opinion:

ROBERT C. TUCKER,
Clerk, U. S. Court of Appeals
for the Eighth Circuit.

APPENDIX D.

Constitution of the United States, Amendment V:

"No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger, nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Constitution of the United States, Amendment VI:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

Sherman Act, Section 1, (15 U. S. C. 1):

"Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal: *Provided*, That nothing herein contained shall render illegal, contracts or agreements prescribing minimum prices for the resale of a commodity which bears, or the label or container of which bears, the trade mark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or dis-

tributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions, under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale, and the making of such contracts or agreements shall not be an unfair method of competition under Section 5, as amended and supplemented, of the act entitled 'An Act to create a Federal Trade Commission, to define its powers and duties, and for other purposes,' approved September 26, 1914: *Provided further*, That the preceding proviso shall not make lawful any contract or agreement, providing for the establishment or maintenance of minimum resale prices on any commodity herein involved, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court."

Clayton Act, Section 5(a) (15 U. S. C. 16(a)):

"A final judgment or decree heretofore or hereafter rendered in any civil or criminal proceeding brought by or on behalf of the United States under the antitrust laws to the effect that a defendant has violated said laws shall be *prima facie* evidence against such defendant in any action or proceeding brought by any other party against such defendant under said laws or by the United States under section 4A, as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto: *Provided*, That this section shall not apply to consent judgments or decrees entered before any testimony has been taken or to judgments or decrees entered in actions under section 4A."

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In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 832

BEATRICE FOODS COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. 27–59) is reported at 312 F. 2d 29.

JURISDICTION

The judgment of the court of appeals was entered January 2, 1963. By order of Mr. Justice Brennan dated February 4, 1963, the time for filing a petition for a writ of certiorari was extended to February 27, 1963. The petition was filed on February 15, 1963. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the record contains substantial evidence to support a jury verdict that petitioner violated Section 1 of the Sherman Act by combining and conspiring with others to fix non-competitive prices and discounts on sales of milk to two government installations.

2. Whether the district court's instructions adequately apprised the jury that it could convict petitioner only if it found, beyond a reasonable doubt, that the United States had proved the particular crime charged in the indictment.

3. Whether the district court abused its discretion in denying petitioner's motion for inspection of the grand jury minutes and dismissal of the indictment, when, after examining the minutes *in camera*, the court concluded that the allegations in the affidavit supporting the motion were "not supported by the record and therefore [were] without foundation."

STATUTE INVOLVED

Section 1 of the Sherman Act, 15 U.S.C. 1, is printed in Appendix D to the petition (pp. 81–82).

STATEMENT

Petitioner Beatrice Foods Company ("Beatrice") and co-conspirators Roberts Dairy Company ("Roberts") and Alamito Dairy Company ("Alamito") were engaged in the business of purchasing, processing, bottling and distributing milk and cream in the Omaha, Nebraska-Council Bluffs, Iowa area. On August 28, 1958, a one-count indictment was returned against Beatrice, Roberts, and Alamito charging them

with violation of Section 1 of the Sherman Act (P.F. 1–8)[1] by combining and conspiring to "fix and establish non-competitive prices and discounts for milk and cream sold and distributed" to the Offutt Air Force Base and the Veterans Hospital, located in the Omaha area; and to "allocate to the defendant Roberts, the bid contract business of supplying milk and cream to the Veterans Hospital", while "alternately allocat[ing] to the defendants Alamito and Beatrice the bid contract business" for milk and cream sold to Offutt Air Force Base (Pet. 28, fn. 1; P.F. 5).

After a motion had been denied (Pet. 28; P.F. 25–26) defendants Roberts and Alamito pleaded *nolo contendere,* and each was fined $5,000 (Pet. 28; P.F. 52, 53). Beatrice pleaded not guilty and on May 8, 1961, moved on the basis of an affidavit [redacted] of one of its counsel which asserted misconduct by government attorneys before the grand jury that the grand jury minutes be produced for its inspection and that the indictment be dismissed (Pet. 28–29, 38; P.F. 134–139). The case then went to trial. At the close of the government's evidence, Beatrice moved for a judgment of acquittal. Upon denial of that motion, Beatrice rested, and the jury brought in a verdict of guilty (Pet. 29). A fine of $15,000 was imposed (Pet. 27; P.F. 161). After conviction Beatrice renewed its motions for dismissal of the indictment and for judgment of acquittal, and, in the alternative, asked for a new trial. These motions were denied (Pet. 29; P.F. 177).

[1] "P.F." refers to the pleading file certified to this Court.

The Court of Appeals for the Eighth Circuit affirmed.

ARGUMENT

The petition presents no substantial question warranting review by this Court. Rather, it is devoted to a reargument of the evidence before the jury, the adequacy of the district court's instructions, and the correctness of several of the court's discretionary rulings permitting the introduction of certain evidence and denying petitioner's motion for disclosure of the grand jury minutes.[2] All of these contentions were correctly resolved against petitioner by the Eighth Circuit.

1. Petitioner contends that the government's evidence was insufficient to sustain the jury verdict (Pet. 16–19). It is settled that "[t]he verdict of a jury must be sustained if there is substantial evidence, taking the view most favorable to the Government, to support it." *E.g., Glasser* v. *United States*, 315 U.S. 60, 80 (conspiracy to defraud the United States); *American Tobacco Co.* v. *United States*, 328 U.S. 781, 809–810 (action under the Sherman Act). On the basis of a detailed review of the evidence in light of the above standard[3] (Pet. 44), the court of appeals correctly concluded that the evidence was sufficient to support the jury's verdict. The evidence before the jury is summarized in the court's opinion at Pet. 43–44, 49–50.

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[2] Petitioner is not raising before this Court its claim that the grand jury panel had been illegally selected (see Pet. 2–3).

[3] Petitioner's contention that the court of appeals should have reviewed the evidence in light of "[t]he Government's burden of proving a defendant guilty beyond a reasonable doubt . . ." (Pet. 14) confuses the proper standard for review purposes with the standard applicable at trial. Moreover, petitioner's

The indictment charged that the conspirators had fixed and established non-competitive prices and discounts for sales of milk to two large customers, the Offutt Air Force Base and the Veterans Hospital, both located in the Omaha area (Pet. 28, fn. 1). However, since general milk prices in the area "were the base points from which bid discounts were measured" (Pet. 44), it was incumbent upon the government to establish the area prices. For that purpose evidence of prices in the general Omaha area was introduced, and, as petitioner admits (Pet. 9, 19), it was shown that these prices "were uniform".[4] In this connection the government introduced the testimony of Beatrice's Omaha Manager, Mr. Klesath, as to conversations he had had with Roberts' sales manager in which

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claim that the court of appeals applied "an affirmatively adverse" (ibid.) test, which would require the defendant to exculpate itself, ignores the fact that the court expressly applied the proper standard (see Pet. 44). The phrase relied upon by petitioner is extracted from the court's statement, "[w]e cannot say that that evidence * * * was not sufficient to sustain the jury's verdict or that it was so affirmatively adverse as to necessitate an acquittal" (Pet. 49). The latter phrase appears to have been used to indicate the court's judgment that the testimony of one of Roberts' and one of Alamito's officials to the effect that independent judgment was used in bidding for government business (Tr. 99–103, 176–177) was insufficient, in light of all the evidence, to require a judgment of acquittal.

[4] It is stated by petitioner that such uniformity was necessary because of a federal milk marketing order which required the conspirators to pay "identical" prices for raw milk (Pet. 9). In fact, the milk order in question only set minimum prices (see Tr. 133–134); and, of course, even identical acquisition costs would not require identical sales prices or disprove an agreement to maintain noncompetitive prices.

they agreed upon uniform prices for the general area (Tr. 74–85; see Pet. 9).[5]

Proceedings from this foundation, the government then adduced proof of collusive action to fix non-competitive prices and discounts on sales to the two government installations which rested largely on documentary evidence contrasting the bidding practices of Beatrice, Roberts, and Alamito during the period of the conspiracy with their bidding practices before and after that period.

A. Pre-Conspiracy Period

The government introduced evidence showing that from early in 1951, when the Veterans Hospital in the Omaha area was first opened, to about April of 1954, Beatrice, Roberts, and Alamito had been vigorous competitors for the fluid milk business at the Air Base and the Hospital. The winning bids were awarded on discounts that ranged from zero to 10 percent, and each dairy shared in the business at both institutions.

Veterans Hospital. For each of the ten contract periods extending from April 1, 1951 to March 31, 1954, each defendant submitted a bid for the Hospital's business (Pet. 43). Beatrice was the successful

[5] Petitioner has repeatedly referred to the introduction into evidence of these conversations as gross error since, in its view, they did not relate to the charged conspiracy (Pet. 9–10, 19–20). But, as the court of appeals stated (Pet. 50): "Although the Klesath conversations had to do with matters affecting the area generally and were not directed specifically to business at the Base and the Hospital, the pricing at the latter was dependent on the former."

bidder on four occasions with discount offers of 1 percent, 4½ percent and 5 percent twice (*ibid.*).[6] Alamito also received the contract four times: twice at no discount, once at 3 percent, and once at 10½ percent (*ibid.*). Roberts received the award twice on offers of 1 percent and 2 percent discounts (*ibid.*).

Air Base. Bidding at the Air Base was similarly competitive for the eight contract periods from 1952 to 1954. Beatrice won four contracts by offering discounts of 2 percent twice, 3½ percent, and 5 percent (Pet. 43). Roberts was successful twice, bidding zero and 3.96 percent (*ibid.*). Although Alamito, in contrast to the others, offered no discounts during the pre-conspiracy period, it twice obtained the contract by offering lower net prices than either Beatrice or Roberts (Pet. 43; GX 6, 45).

B. CONSPIRACY PERIOD

From about March 1954 to about April 1957 bids to the government institutions reflected a design to divide the business and a rigidly uniform pattern in which all winning bids except one were at a 2 percent discount.

Veterans Hospital. For a three and one-quarter year period, from April 1, 1954 to June 30, 1957—or eight consecutive contract periods—Roberts, alone, obtained the hospital business; and, with but one minor exception, the bid was a 2 percent discount off wholesale price (Pet. 43; GX 46).[7] Beatrice offered no dis-

[6] On one occasion Beatrice offered a discount of 7½ percent but was outbid by Alamito (Pet. 43; see GX 5).

[7] On one occasion a 1½ percent discount for six months was accepted as an alternative to a 2 percent discount for twelve months (Pet. 43).

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counts during the period, except for a single unsuccessful offer of 1 percent in January 1955 (Pet. 7), although it had won the contract for the period immediately preceding the conspiracy with a bid of a 5 percent discount (*ibid.*). Alamito, which could have won every contract at the hospital by merely matching Roberts' 2 percent bids,[8] offered no discounts throughout the entire period, although previously it had bid as high as 10½ percent (Pet. 45).

Air Base. With Roberts secure in its exclusive enjoyment of the hospital business, Beatrice and Alamito divided the Air Base business.[9] This division was accomplished by a virtually perfect rotation of the contract between Beatrice and Alamito, the winner always bidding 2 percent, and the loser usually offering either no discount or a 1 percent discount (Pet. 6). The possibility of coincidence is virtually ruled out by the fact that, as noted above, Alamito could have won any of the bids merely by matching Beatrice's bid. Further, in the contract period preceding the conspiracy, Beatrice had won the contract with a discount of 5 percent, and Alamito had offered no discounts at all until the conspiracy began. Roberts offered no discounts throughout the period of

[8] Alamito qualified as a "small business" under government regulations which would have permitted it to have obtained any contract at the government installations by matching the bids of its competitors (see Tr. 111–113).

[9] Since the dollar volume of fluid milk purchased at the Air Base at the beginning of the conspiracy period was almost exactly twice that at the Veterans Hospital (GX 44; see Tr. 260), the conspirators' arrangement resulted, at least at that time, in each obtaining one-third of the total fluid milk business at the two government institutions.

the conspiracy (Pet. 6), although it had earlier bid as high as 3.96 percent and had twice obtained the Air Base contract (Pet. 43).

The parties' uniform and reciprocal pattern of bidding at the Air Base and the Hospital during the conspiracy period contrasted with their pattern of bidding for similar business at other institutions in Omaha. For example, in bidding for contracts at the University of Nebraska Hospital during the conspiracy (Pet. 8), Beatrice offered three discounts of 10 percent, one of 6½ and one of 5 percent. Roberts and Alamito both offered discounts varying from zero to 15 percent. See fn. 13, *infra*.

C. POST-CONSPIRACY PERIOD

After the beginning of the investigation which culminated in the return of the indictment, the bidding pattern once again shifted.

Veterans Hospital. On July 1, 1957, Alamito, for the first time in more than three and one-half years, offered a 2½ percent discount (Pet. 43) and took the business which Roberts had enjoyed for eight successive contracts. Beatrice also broke the pattern by obtaining the award on a 5 percent discount for the contract period beginning July 1, 1958 (*ibid.*). Roberts then retrieved the business for the following period with an offer of a 10 percent discount (*ibid.*).

Air Base. Shortly after the commencement of the government investigation, Roberts submitted a bid to the Air Base for the bid period beginning June 1, 1957, that amounted to a discount of 8 percent for a portion of the contract (Pet. 43), even though in the preceed-

ing three and one-half years Roberts had offered the Air Base no discount whatever. Beatrice abandoned its usual 2 percent bid and offered approximately 4 percent off wholesale for the contract period from December 1, 1957 to May 31, 1958 (Pet. 43–44), and in the next period the net prices offered by both Beatrice and Alamito for gallons of milk were approximately 5 percent below list price (*ibid.*).

The court of appeals' ruling accords with the decision of this Court in *Interstate Circuit, Inc.* v. *United States,* 306 U.S. 208. In that case, the Court, noting that the government had presented no direct evidence of collusive action, held that an illegal agreement was nevertheless established by "inferences drawn from the course of conduct of the alleged conspirators", to wit, the "substantial unanimity of action" taken by defendants. 306 U.S. at 221. In the instant case, the parties' bidding patterns and practices before, during, and after the conspiracy raise a compelling inference that the bids were collusive. Moreover, in the presence of such evidence, the "burden rested on [petitioner] of going forward with the evidence to explain away or contradict it", 306 U.S. at 226, and petitioner failed to proffer contradictory or explanatory evidence.[10]

[10] See also *United States* v. *Paramount Pictures, Inc.*, 334 U.S. 131, 142; *United States* v. *Masonite Corp.*, 316 U.S. 265, 274–276. Petitioner's reliance on *United States* v. *Borden Co.*, 347 U.S. 514, is misplaced. In that case the Court merely held that on "the record * * * before us" the government has "not established a case under the Sherman Act". 347 U.S. at 516. Here, as we have shown above and the court of appeals pointed out (Pet. 54), the government's case "rises above [that] presented in *Borden*."

2. Petitioner argues that the district court's charge to the jury, considered in light of government counsel's summation, amounted to an instruction that the jury could find it guilty of a crime not charged in the indictment (fixing prices in the general Omaha market) (Pet. 2, 19–21). We recognize, of course, that a conviction "on a charge the grand jury never made" cannot stand. *Stirone* v. *United States*, 361 U.S. 212, 219. But, as the court of appeals concluded, no such contention can be supported on the facts of this case.

In the charge to the jury (Tr. 372–394, reprinted at Pet. 60–78), the district court (Judge Robinson) began its discussion of the applicable law by stating that the government had to establish "the crime charged in the indictment", and to prove it was committed "within the Judicial District of the State of Nebraska" (Pet. 61). Judge Robinson then quoted the indictment, which charged a conspiracy to fix noncompetitive prices and discounts for the sale of milk to the Air Base and Veterans Hospital in Omaha (Pet. 63). After discussing the Sherman Act and the law of conspiracy (Pet. 63–67), the court framed the issues before the jury (Pet. 67): "The question with you is whether or not Beatrice Foods Company has entered into an agreement to fix and establish prices and discounts on milk or to divide or allocate the bid business of supplying milk to Offutt Air Force Base and the Veterans Hospital". Judge Robinson next instructed the jury that a conspiracy to fix prices violated the antitrust laws (Pet. 67–69) and that, if the government had proved a price-fixing conspiracy "in interstate commerce within the Omaha area, you must

find them guilty notwithstanding the motives or purposes of the defendant" (Pet. 70). He then reiterated that the charged violation consisted of defendant's fixing non-competitive prices for "milk sold to Offutt Air Force Base or the Veterans Hospital" and pointed out that "[t]he mere fact that the Government was the customer or prospective customer in the transactions under examination is immaterial" (Pet. 70, 71). Judge Robinson concluded his charge with a discussion of the type and quantum of proof essential to a finding of guilt (Pet. 72–77).

Petitioner argues (Pet. 19–20) that the court's instructions to the jury went beyond the crime charged in the indictment because the court made two references to price-fixing in "the Omaha area" (Pet. 70).[11]

[11] The paragraphs in which mention was made of "the Omaha area" were, in their entirety as follows (Pet. 69–70):

"So ladies and gentlemen, whatever justification or motive, whether economic, benevolent, or otherwise, that price-fixing agreements may be said to have, the law does not permit inquiry into their reasonableness. Therefore, if you determine that the defendants agreed or conspired to fix, stabilize, or control prices, or agreed to maintain uniform and non-competitive prices of dairy products in interstate commerce within the Omaha area, you must find them guilty notwithstanding the motives or purposes of the defendant in so agreeing or acting.

"The Court has stated to you the purposes of the Sherman Antitrust Act and the restrictions under it, but has not intended to leave the impression that it is unlawful for dairy operators to sell dairy products at the same or uniform prices, nor is it unlawful for one dairy to meet the price of another dairy, whether the price is lower or higher. The mere fact that one or more of the dairies involved here may have promptly met the price of another, or that there was a simultaneous price change, if such is the evidence in your opinion, is not sufficient to warrant you in returning a verdict of guilty. Before you can convict the defendant on trial in this case you must find

But at this point in the charge the court was explaining that a conspiracy to fix prices is illegal *per se* and cannot be justified and that a verdict of guilty could be rendered only upon a finding that the non-competitive pricing policies of Beatrice had resulted from a conspiracy. The district judge had already made the point clear—in the introduction, in the reading of the indictment, and in the paragraph in which he framed the issue—that the prices in question were those to the Air Base and the Veterans Hospital. In the passages relied upon by petitioner, the court was in no way concerned with precisely delimiting the scope of the charged violation. When read as a whole, as they must be (*e.g., Northcraft* v. *United States,* 271 F. 2d 184, 188 (C.A. 8); *Anderson* v. *United States,* 262 F. 2d 764, 773 (C.A. 8), certiorari denied, 360 U.S. 929), the instructions "adequately present[ed] the issues in a form understandable to the jury" (Pet. 58), and made clear that the charged violation related only to the Air Base and Veterans Hospital. As the court of appeals held (Pet. 58):

> It seems clear to us * * * that the jury did not assume or understand that Beatrice was charged with anything other than a conspiracy directed solely to the Base and the Hospital or, to express it reversely, that it understood Beatrice was not charged with a conspiracy to fix uniform prices generally in the Omaha market. We are persuaded as to this by the court's and

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from the evidence, beyond a reasonable doubt, that any equality or uniformity of prices at a given time resulted, as the Court has stated, from a combination or conspiracy to fix, control or maintain prices of dairy products in the Omaha area."

> counsels' repeated emphasis upon the Base and the Hospital as the objects of the conspiracy. Also, the indictment was read to the jury and was specific in its confining aspects.[12] * * *

In holding that the district court's instructions to the jury could not fairly be read to permit the conviction of Beatrice for a crime not charged in the indictment, the court of appeals observed that "as to this, we have considered the government's closing arguments" (Pet. 58). Thus, the court of appeals rejected petitioner's suggestion, renewed here, that government counsel in his summation "departed entirely from the indictment" (Pet. 9–10, 19–20).

Actually, government counsel repeatedly described the nature of the charged violation with careful accuracy. At the outset of his argument to the jury, counsel pointed out that "the charge is that the Beatrice Foods Company, Alamito and Roberts were conspiring to fix prices *at two Government installations, and two, only; the Offutt Air Force Base and the Veterans Hospital*" (Tr. 328, emphasis added). He further stated that the defendant must be found guilty only if the jury concluded, beyond a reasonable doubt, that Beatrice was "engaged in price fixing in the sale of milk to these two Government institutions" (Tr. 329). Finally, in detailing the government's proof that Beatrice and the co-conspirators had fixed milk

[12] The district court's refusal to charge the jury, as requested by petitioner, that the sole issue is "whether the Government has proved the defendant guilty of the particular conspiracy defined in the indictment" (Pet. 79) is of no consequence. As shown above, the substance of that request was adequately covered in the charge as given.

prices and discounts to the above two institutions, he gave the members of the jury miniature copies of several charts introduced into evidence by the government (GX 42, 44, 45, 46, 52, 54, 55, 75, 76, 89)—all but one of which (GX 55) related only to discounts and prices offered to the Offutt Air Force Base and Veterans Hospital[13]—and analyzed them for the remainder of his argument(see Tr. 337–348). While he also discussed evidence relating to the parties' identical prices in the Omaha area in January 1957, and noted that this indicated a general price fixing scheme at that time as well as on an earlier occasion (Tr. 330–334), this discussion was merely background for the argument addressed to the specific charge in the indictment. Thus his argument moved to the issue at trial (Tr. 334): "But that isn't the end of the story. Those prices which were fixed were carried over to the bids made to the Veterans Hospital and Offutt. Those same prices that were fixed in the manner they were fixed appeared on the bid sheets, as we shall see when we discuss the charts."

Because it was necessary for the United States to prove the uniform base prices from which the non-competitive discounts to the Air Base and the Veterans Hospital were computed (see Pet. 58), in order to establish that the non-competitive discounts affected

[13] GX 55 showed the discounts offered by Roberts, Alamito, and Beatrice to the University of Nebraska Hospital from June 1954 through June 1957, but did not list or refer to milk prices in the general Omaha market. It was introduced to show that while the conspirators allocated among themselves the business at Offutt and the Veterans Hospital, they were "actively bidding" for sales to the University (see Tr. 342-343).

the ultimate awards, it was proper for government counsel to comment on the base prices in the summation. His opinion on the legality of the methods used to establish the general area prices could not have confused the jury as to the nature of the alleged violation, for, as pointed out above, government counsel had repeatedly made clear in his argument that the charged crime involved only the "bids made to the Veterans Hospital and Offutt" (Tr. 334). Moreover, as the court of appeals observed (Pet. 58), the government's "evidence itself was overwhelmingly directed to the two institutions", and the district court's instruction adequately delineated the limited scope of the charged violation.[14]

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[14] Petitioner's contention that the court of appeals "fail[ed] to consider the cumulative prejudice of multiple evidentiary and instructional errors" (Pet. 2, 21-24) is misplaced. The short answer is that there were no such multiple errors. We have shown above, and the court of appeals held (Pet. 57-59), that the trial judge's instructions to the jury were proper. In the section of its opinion headed "*Errors in the reception of evidence*", the court held that only *one* item of hearsay testimony was improperly admitted, and found that any prejudicial effect such testimony might have had was cured by the fact that the district court, "on its own motion, struck that testimony and directed the jury to disregard it" (Pet. 56). As to one other item of evidence, while the court of appeals had some "doubt" about admissability, it held that "we are not convinced that, if its admission was error, there was resulting prejudice" (Pet. 57). On the record in this case, therefore, the court of appeals was clearly correct in refusing to reverse for procedural errors. Errors "which do not affect the substantial rights of the parties" are not grounds for reversal and must be "disregarded". 28 U.S.C. 2111; Rule 52(a), F.R. Crim. P.; *Kotteakos* v. *United States*, 328 U.S. 750, 764-765; see *Delli Paoli* v. *United States*, 352 U.S. 232, 242; *Goins* v. *United States*, 99 F. 2d 147 (C.A. 4), certiorari dismissed, 306 U.S. 622.

3. More than two and one-half years after return of the indictment, on the day trial began, petitioner moved that the "grand jury minutes be produced for inspection by the defense and the court" and that the indictment be quashed because of misconduct of government attorneys before the grand jury (Pet. 38). The motion was supported solely by an affidavit of one of petitioner's attorneys. He asserted that 3 witnesses before the grand jury had recorded on tape immediately after testifying that the government attorneys, in front of the grand jury, had threatened them with prosecution for perjury and asserted that defendants had committed the crime being considered (*ibid.*). Neither the tapes nor affidavits of the witnesses were proffered. The district judge, after examining the grand jury transcript *in camera* and finding that the allegations in the affidavit "are not supported by the record and therefore are without foundation," denied the motion (Pet. 38; P.F. 177). The court of appeals affirmed, stating (Pet. 42): "We do not see in the allegations of this affidavit anything which suggests that the ends of justice require that the whole or any part of this [grand jury] transcript be made available to the defendant." The court of appeals noted that it also had carefully read the transcript (Pet. 42).

Petitioners' argument now seems to be that the *in camera* reading of the grand jury transcript by the courts below was "Star Chamber procedure" under which evidence was "received and weighed" against it in violation of its constitutional right to confrontation of adverse witnesses (Pet. 25). This contention is without merit, even apart from the fact that the

conviction here was by a jury which did not even see the transcript.

Grand jury proceedings are, and historically have been, confidential. *United States* v. *Johnson*, 319 U.S. 503; *United States* v. *Proctor & Gamble Co.*, 356 U.S. 677, 681–682 and fn. 6. Rule 6(e), F.R. Crim. P., sets forth the only conditions under which federal courts can permit defendants to view grand jury minutes. Interpreting that rule, this Court has recently held, in upholding a district court's denial of an antitrust defendant's motion requesting disclosure, that "Rule 6(e) is but declaratory" of the established principle that disclosure is "committed to the discretion of the trial judge." *Pittsburgh Plate Glass Co.* v. *United States*, 360 U.S. 395, 399 (footnotes omitted). And the burden is on the moving defendant to establish that "a particularized need" exists for the minutes. *Id.* at 400.

The court of appeals here held that the trial court's denial of petitioner's motion "was not an abuse of discretion" (Pet. 42) since Beatrice did not establish a particularized need for the grand jury transcript (Pet. 41). In support of this conclusion the Eighth Circuit cited the following facts (Pet. 40–41): (1) although the affidavit of petitioner's counsel alleged that that witnesses' statements were made "immediately" after testifying before the grand jury, the motion was not made until more than two and one-half *years* after the indictment was returned, (2) no supporting affidavit from any of the three witnesses was presented, (3) the complaining witnesses, all of whom were agents or employees of Roberts, were only three

of many appearing before the grand jury, (4) recorded statements were taken from some of the other witnesses, but the affidavit contained no similar reference to any of those, and (5) one of the three witnesses testified at the trial.

The fact that the district court and the court of appeals, out of an abundance of caution, undertook to examine the grand jury transcript, although they need not have done so,[15] does not make petitioner's case any stronger. It can hardly complain that its motion received closer scrutiny than it was entitled to.

CONCLUSION

It is respectfully submitted that, for the foregoing reasons, the petition for a writ of certiorari should be denied.

ARCHIBALD COX,
Solicitor General.
LEE LOEVINGER,
Assistant Attorney General.
ROBERT B. HUMMEL,
GEORGE R. KUCIK,
I. DANIEL STEWART, JR.
Attorneys.

APRIL 1963.

[15] Part of the district court's discretion in passing on motions under Rule 6(e) is the determination whether *in camera* inspection of the grand jury minutes is warranted. *E.g., Pittsburgh Plate Glass Co.* v. *United States*, 260 F. 2d 397, 404 (C.A. 4), affirmed, 360 U.S. 395; *Brilliant* v. *United States*, 297 F. 2d 385, 391 (C.A. 8), certiorari denied, 369 U.S. 871.

U.S. GOVERNMENT PRINTING OFFICE 1963

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OCTOBER TERM, 1962.

No. 832

BEATRICE FOODS CO.,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI.

GEORGE B. CHRISTENSEN,
Counsel for Petitioner.

WINSTON, STRAWN, SMITH & PATTERSON,
38 South Dearborn Street,
Chicago 3, Illinois,

FITZGERALD, HAMER, BROWN & LEAHY,
Insurance Building,
Omaha 2, Nebraska,
Of Counsel.

THE GUNTHER-WAHLEN PRINTING COMPANY, CHICAGO

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The Brief in Opposition, at a time when the Department of Justice is resorting to criminal anti-trust prosecutions to an unprecedented degree so that a proportionate increase of appellate work in that field may be anticipated, asserts that this unusual case in which (a) the Government had two of the three asserted conspirators testify there was no conspiracy while the third stood mute, (b) the trial judge repeatedly directed or authorized conviction on charges wholly outside the indictment which the prosecutor claimed he had proved, and (c) the Court of Appeals affirmed *without once considering whether the evidence was sufficient to convince beyond a reasonable doubt in the face of its admission* (Pet. p. 49) that *"the case was not a strong one"* and that it *would have been "possible . . . to decide the issue otherwise"* (Pet. p. 50) presents no substantial question warranting review. That is true only if

this Court is to approve lower standards in anti-trust prosecutions than it insists on in ordinary *malum in se* prosecutions.

Although the Brief in Opposition asserts (n. 3, p. 5) the Court of Appeals "expressly applied the proper standard (see Pet. 44)," the indubitable fact is that it did not. All that the Court of Appeals did at Pet 44 was to state the truisms that it was to consider the evidence in its most favorable aspect to the Government and that a conviction could rest upon circumstantial evidence. Nowhere did the Court of Appeals find or say that the evidence was sufficient to convict beyond a reasonable doubt. Instead, it created a new test. The evidence must be "affirmatively adverse" (Pet. 49) to the prosecutor's contention if there is to be an acquittal. This is a wholly new phrase in criminal law and warrants full examination.

The brevity of this Reply is not to be taken as a concession that there are not other serious faults in the Brief in Opposition. Each point in the Petition, we believe, is wholly valid.

We respectfully suggest the case presents grave questions of national importance.

Respectfully submitted,

GEORGE B. CHRISTENSEN,
Counsel for Petitioner.

WINSTON, STRAWN, SMITH & PATTERSON,
38 South Dearborn Street,
Chicago 3, Illinois,

FITZGERALD, HAMER, BROWN & LEAHY,
Insurance Building,
Omaha 2, Nebraska,
Of Counsel.

April 22, 1963.